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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 619

JOHN ANDREADIS (or JOHN ANDRE) and
DRUG RESEARCH CORPORATION,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, John Andreadis and Drug Research Corporation, pray that a writ of certiorari issue to review the judgment (as to each of them) of the United States Court of Appeals for the Second Circuit entered in this case on September 1, 1966 (Appendix B hereto, *infra*).

Opinions Below

The opinion of the Court of Appeals, printed as Appendix A hereto, *infra*, is not yet reported. The District Court did not write any formal opinion.

Jurisdiction

The judgment of the Court of Appeals as to each peti tioner was entered on September 1, 1966 (Appendix I hereto, *infra*). The jurisdiction of this Court is invoke under 28 U.S.C. §1254(1).

Questions Presented

The individual petitioner (John Andreadis) is presiden of the corporate petitioner. Petitioners were convicted o charges of mail fraud, wire fraud, misbranding and mai and wire fraud conspiracy in connection with a weight reducing item called Regimen Tablets. The questions are:

1. Were the petitioners denied a fair trial by the Tria Court's refusal to instruct the Jury that for convictio under mail and wire fraud counts of a Federal indictmen there had to be proof that some person or persons ha actually been defrauded, and should the indictment b dismissed for failure to charge to that effect? Does th conclusion by the Court of Appeals in this case that suc proof is not needed, a conclusion which is apparently con trary to a recent earlier Second Circuit decision (*Unite States* v. *Baren*, 305 F. 2d 527 (C.A. 2 1962)) and unques tionably contrary to a recent Sixth Circuit decision (*Unite States* v. *Rabinowitz*, 327 F. 2d 62 (C.A. 6 1964)), wrongl read the Federal Mail and Wire Fraud statutes in a vita aspect of legislative policy affecting one of the most im portant areas of Federal criminal law enforcement, an does it create a conflict among Circuits such as to requir this Court's review?

2. Were petitioners denied a fair due process trial by the reception in evidence, on a theory of notice or scienter, of inflammatory and prejudicial hearsay disparagements of Regimen tablets?

3. Were petitioners denied a fair due process trial by conduct of the prosecution which we contend amounted to participation in a sensationalized attack on Regimen tablets in a widely circulated book and in the mass circulation publication known as "TV Guide" which appeared in the midst of this trial?

4. Were petitioners denied a fair due process trial, and may their conviction be sustained under the rule of reasonable doubt—or was it even proper to submit the case to the Jury—in view of the nature of the Government's "expert opinion" proofs especially on the issue of intent to deceive? Was that opinion proof in this case sufficient, under the test of *Reilly* v. *Pinkus*, 338 U.S. 269, *viz.*, was it sufficient to justify the inferring of falsity and an intent to deceive where the medical evidence did not show the universality of scientific belief that the advertising representations of petitioners were wholly unsupportable? Were the instructions to the Jury prejudicially erroneous on this subject of the expert evidence in the case?

5. Was there sufficient independent evidence of conspiracy for submission to the Jury or for conviction under the rule of reasonable doubt? And if the conspiracy convictions canot stand, must not the convictions on the substantive counts be reversed because of the integrated character of the indictment and the prejudicial effects of conspiratorial hearsay?

6. Should the convictions under the misbranding count (No. 57) be reversed for failure of proof of intentional

falsity and because of denial of fair trial on the misbranding charges in that the distinct issues of guilt or innocence under those charges were hopelessly confused with the other indictment charges, resulting in a jury verdict of disagreement on eleven of the twelve misbranding counts which cannot be rationally reconciled with the verdicts as a whole and appears to be a compromise verdict?

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment due process clause. It also involves 18 U.S.C. §1341 (mail fraud), §1343 (wire fraud), §371 (conspiracy), and §2 (aiding and abetting); also 21 U.S.C. §331(a), §333(b), §352(a) and §352(f) (misbranding). These mail fraud, wire fraud and misbranding statutes are quoted in Appendix C hereto, *infra*.

Statement of the Case*

Petitioners were convicted in the United States District Court for the Eastern District of New York (Bartels, D.J.), after a jury trial, under multiple substantive counts of mail fraud and wire fraud, one count of conspiracy to commit such mail fraud and wire fraud, and one count of misbranding, in regard to a weight-reducing preparation called Regimen Tablets. The United States Court of Appeals for the Second Circuit affirmed the convictions.

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* By permission of the Court of Appeals, the appeal below was heard on the original trial record, without printing. The record is very lengthy, and we filed in the Court of Appeals several photocopies of the trial testimony, the indictment and certain other basic items in the trial record. We are endeavoring to secure those extra photocopies for filing in this Court. Our references to the record in the Court of Appeals will appear as "R. ".

The petitioner John Andreadis (or Andre), president of the corporate petitioner Drug Research Corporation, was sentenced to imprisonment and fined as follows:—18 months on each of 16 counts of mail fraud, on 27 counts of wire fraud, on the single conspiracy count for mail and wire fraud, and on one count of misbranding, to run concurrently; fine of $1,000 on each of said 16 counts of mail fraud and on the 27 counts of wire fraud, $3,000 on the conspiracy count, and $4,000 on the misbranding count, totalling $50,000. The corporate defendant, Drug Research Corporation, was fined $1,000 on each of 16 counts of mail fraud and on 27 counts of wire fraud, $5,000 on the conspiracy count, and $5,000 on the misbranding count, totalling $53,000.

At the end of the Government's case the Trial Court granted a motion for judgment of acquittal as to two of the mail fraud counts (Counts 7 and 14). The Jury disagreed as to 11 of the 12 misbranding counts (Counts 47 to 56 inclusive and Count 58).

The indictment contained 58 counts—18 counts of mail fraud, 27 counts of wire fraud, the mail-and-wire-fraud conspiracy count (Count 46), and 12 counts of misbranding. The mail fraud counts (No's. 1 to 18) were laid under 18 U.S.C. §§ 1341 and 2. The wire fraud counts (No's 19 to 45) were laid under 18 U.S.C. §§ 1343 and 2. The conspiracy count (No. 46) was laid under 18 U.S.C. § 371. The misbranding counts (No's. 47 to 58) were laid under 21 U.S.C. §§ 331(a), 333(b) and 18 U.S.C. §2, charging respectively misbranding within the meaning of 21 U.S.C. §352(a) (under Counts 47 to 55 inclusive) and of such misbranding plus misbranding within the meaning of 21 U.S.C. § 352(f)(1) (under Counts 56 to 58 inclusive).

The indictment also named as defendants (under all 58 counts) Saul Miklean, Arthur D. Herrick and New Drug Institute, Inc.; it also named as a defendant, under all counts except the misbranding counts, Kastor, Hilton, Chesley, Clifford and Atherton, Inc., an advertising agency. The prosecution was dismissed as against Herrick and severed as against Miklean. New Drug Institute, Inc. pleaded guilty to six counts of the indictment, not including the conspiracy count. The trial herein proceeded against the defendants Andreadis, Drug Research and Kastor-Hilton.*

The mail fraud counts of the indictment (Counts 1 through 18) were all identical except that each charged a separate mailing. Count 1 was set up in the indictment as the prototype for all of the mail fraud counts, Counts 2 to 18, being patterned after Count 1 as regards the first several paragraphs of that count, which were adopted by reference in each of the subsequent mail fraud counts. Those prototype paragraphs (as they appear in Count 1 and as repeated by reference in Counts 2 to 18) charged *inter alia* that between 1956 and 1963 the defendants

> "* * * knowingly caused placards and posters to be produced, disseminated and displayed by druggists and others, and caused paid advertisements to appear in newspapers and magazines, * * * and caused paid commercials to be presented on television programs * * * intended to bring to the attention of the persons to be defrauded various false and fraudulent pretenses, representations and promises made to solicit the use and purchase of the drug, 'Regimen

* Kastor-Hilton was convicted under 40 of the mail and wire fraud counts, and under the conspiracy count, being fined a total of $50,000. It did not appeal.

Tablets', which pretenses, representations and promises the defendants well knew were false and fraudulent when made, and included but were not limited to, the following:

(1) 'No-Diet Reducing with Regimen Tablets'

(2) 'Causes your body to lose weight the fastest-acting way! It's safe . . . . automatic!'

(3) 'No diet, no special eating, no giving up the kinds of foods you like. New drug acts directly on cause of your overweight!'

(4) 'It's true! If you're normally healthy, you can lose as much as 70 lbs. *without* cruel diets, *without* giving up all your favorite foods!'

(5) '3-Way Action Makes it Easier and Faster to Lose Weight!

'Regimen Tablets are aspirin-size, easy to take, and work 3 *amazing ways* for fast, effective weight-loss.

'1. They *suppress* your appetite; you eat the foods you like, without overeating.

'2. They force you to lose weight *automatically* by *removing* excess "fluid weight".

'3. They start traveling quickly thru your blood stream . . . and you lose the Tremendous Urge to Eat! No super will power. You Feel Completely Satisfied on Far Less Than Your Normal Intake—Yet You Lose Weight Faster and Easier Than You Thought Possible!'

(6) 'A new combination of reducing drugs helps reduce caloric intake—you feel satisfied on far less.'

(7) 'The only drug combination for your body to lose weight this fastest-acting way.'

(8) 'Regimen Tablets for Reducing without Special proved drug combination to help you reduce.

(9) 'Regimen Tablets! A completely new, clinically proved drug combination to help you reduce caloric intake.'

3. It was further a part of said scheme and artifice that the defendants * * * employed certain persons to act as endorsers for the drug, 'Regimen Tablets' in the aforesaid placards, posters, paid advertisements and commercials, in which placards, posters, paid advertisements and commercials said endorsers claimed that by using 'Regimen Tablets' and 'without dieting' or 'special eating' and other similar phrases, each achieved a substantial weight loss in a short duration of time, whereas in truth and in fact, as defendants well knew, to produce said weight loss the said endorsers were receiving collateral medication and/or were consciously and drastically restricting their caloric intake, and utilizing and employing other similar devices.

4. It was further a part of said scheme and artifice that the defendants * * * included in the aforesaid placards, posters, paid advertisements and commercials, pretenses and representations to the effect that a clinical test had been established the efficacy of said drug, whereas in truth and in fact, as the defendants had sufficient reason to believe, the alleged clinical test was false and fraudulent and of little or no scientific value * * *."

The wire fraud counts (Counts 19 to 45) re-alleged the above quoted allegations from the prototype mail fraud count.

The conspiracy count (Count 46) alleged that from on or about October 1, 1956 and continuing to on or about December 30, 1963 the defendants conspired to commit mail fraud and wire fraud offenses in regard to the above described charges of substantive violations. The conspiracy count both in the charging part and in the single overt acts paragraph in effect incorporated by reference the preceding forty-five counts of mail fraud and wire fraud.

Of the misbranding counts (Counts 47 to 58) it is necessary only to mention Count 57, the only misbranding count on which Petitioners were convicted.* Count 57 alleged, in part, misbranding of Regimen Tablets in that—

> "* * * its labeling, namely the box label, the circular in each box, reading in part, 'Reduce with the Regimen Plan', and the display carton reading in part, 'New! Regimen Tablets for appetite control * * * ', contained statements representing and suggesting: (1) that the article of drug was adequate and effective for weight reduction and control by curbing and controlling the appetite; (2) that the article of drug would satisfy hunger; (3) that the article of drug would remove excess water found in all fatty deposits; (4) that the Regimen Plan could do most everything medical science could do to help you attain your goal; (5) that the article of drug makes you lose excessive weight which makes cirrhosis of the liver much more possible than in slender folks; and (6) that it has been shown that fat people are more susceptible to cancer; which statements were false and misleading in that the said article of

* The defendant Kastor-Hilton was not named in the misbranding counts; and the jury disagreed on 11 of the 12 misbranding counts.

drug was not adequate and effective for the purposes and conditions set forth in '(1)', '(2)', '(3)', (4)', '(5)' and '(6)' of this paragraph.

2. * * * in that its labeling, namely, the display kit No. 105 consisting of counter displays, streamers and easels * * * read in part, 'I lost 25 lbs. in 30 days taking Regimen Tablets without a diet * * * ', 'I lost 28 lbs. in 28 days taking Regimen Tablets without dieting * * * '. 'Through Regimen Tablets the only reducing drug for no diet reducing.' 'Lost up to 6 lbs. in 3 days, up to 9 lbs. the first week * * * ' and 'Actual doctors' tests proven fast and safe no diet reducing Regimen Tablets * * * , * * * ."

For reasons importantly affecting the issues in this petition as to the sufficiency of the evidence, it is useful to take up the trial testimony in the chronological order of the Government witnesses as they appeared on the stand; the defense introduced no evidence.

Four inspectors of the Federal Food and Drug Administration testified concerning purchase of Regimen Tablets and observation of advertising displays in stores in a number of cities (Seaman, Sherman, Goldstein, Schwede—R. 70-310).

Robert Goldman, an employee of N.Y.S.C.O. Laboratories, a drug manufacturer which made Regimen Tablets for the defendant drug corporation, testified as to the composition of the tablets, which included (for combined use) a pink, a green, and a yellow tablet (R. 316-318). The pink tablet was composed of 648 milligrams of ammonium chloride, the green consisted of 7½ milligrams of benzocaine, and the ingredients of the yellow were 25 milligrams of phenylpropanolamine hydrochloride (hereinafter re-

ferred to as PPA) and 35 milligrams of caffeine (R. 319 to 321). Artificial coloring was added in order to make them more easily identifiable to the consumer (R. 321, 324, 325). The green tablet, in addition to benzocaine, contained Vitamins D, Thiamin, Riboflavin, Ascorbic Acid, Pyredomine Hydrochloride, Pantothenate, Niacinamide and Diastase of Malt (R. 326). The yellow tablet also contained iron, copper, iodine and manganese (R. 326, 327).

Jean Mayer, associate Professor of Nutrition at the New School of Public Health, Harvard University, who was neither a pharmacologist nor a medical doctor, but was qualified by the Court as an expert witness, gave it as his opinion, based on his experience, plus a review of the literature on the subject of obesity, plus the facts as to the dosage levels of Regimen Tablets, that the tablets are not effective for weight control (R. 335-407). Professor Mayer had never prescribed any medicine to anyone (R. 417). He also admitted that he had not performed any clinical tests with Regimen Tablets (R. 472). Although Mayer had said on direct examination that he was opining on a basis of medical consensus, it developed in the cross-examination, that he was himself in disagreement with recognized authorities on the subject, including published criticisms of a clinical report which had been unfavorable to Regimen Tablets (the Fazekas report) (R. 541-556). Mayer admitted also that he had never conducted a clinical test or experiment with PPA (R. 2205).

Dorothy Bryce testified that she had been employed by the Kastor-Hilton Advertising Agency, after being interviewed by Andreadis, to appear on a series of television commercials over a period of weeks to display progressive

weight losses as a result of using Regimen (R. 698 *et seq.*). Evidently the Government's intention through the testimony of this witness was to show that both Andreadis and Kastor-Hilton had paid Dorothy Bryce to claim falsely that her weight losses were attributable to the Regimen Tablets taken as directed, and that the true facts were (according to the Government's theory) that Mrs. Bryce was dieting severely and was also taking collateral medications, all with the knowledge of Andreadis and Kastor-Hilton (see R. 703-722, 727-817, 922-981, 1075-1078; see also the Court's summary of Mrs. Bryce's testimony in the charge at R. 5712-5721). On cross-examination Mrs. Bryce acknowledged that she had extremely strong personal financial motivations for wanting this lucrative TV employment, the inference being pretty unmistakable that she was herself, without any urging from anyone, determined to try to achieve a dramatic loss of weight by means additional to the Regimen Tablets (including drastic dieting, etc.), from which a jury could easily conclude that it was Mrs. Bryce herself and not the defendants who were the entrepreneurs of any fraud in connection with her TV activity (R. 1089 *et seq.*). She also admitted that before starting this TV campaign she had seen a private doctor who had previously treated her for overweight and that this doctor had told her that it was medically all right for her to take the Regimen Tablets (R. 1092-1099). She also admitted that the Kastor-Hilton representative had not told her that she could eat whatever she wanted, but that he had asked her to stop drinking and not eat banana-splits or pastries (R. 1102-1106). She also admitted that in depositions in a collateral proceeding prior to this trial she had testified that she had felt an appetite curb from the Regimen Tablets

(R. 1107-1110). For a summary of additional admissions by Mrs. Bryce in the cross-examination see the Court's charge to the jury at R. 5721-5736.

Antonia Antonacci, another of the TV "commercial" figures in the Regimen Tablet weight reduction series, was called by the Government with a view to establishing substantially the same themes as in the testimony of Mrs. Bryce (R. 1474 et seq.).—*i.e.*, that Kastor-Hilton and Andreadis had engaged her to portray falsely on TV a series of weight losses which were not in fact accomplished by use of Regimen Tablets but required severe dieting, etc. However, on cross-examination she admitted that she took the Regimen Tablets regularly, and she was confronted with a statement made in sworn depositions that Regimen had really cut her appetite (R. 1724-1730) (see Court's Exhibit MM). She was also confronted with prior sworn testimony that—notwithstanding her quite explicit testimony in this trial of Andreadis' having had a discussion with her about the necessity of dieting in addition to taking the Regimen Tablets—she had stated that she could hardly remember what Andreadis looks like let alone what he said (R. 1735-1742).

Lester Morris was also called by the Government for the same purpose as Mrs. Bryce and Mrs. Antonacci (R. 1926, et seq.). He admitted that in prior sworn testimony he had stated that during the weight reducing test he had eaten basically the same foods that he had previously eaten except for reduced amounts (R. 2059). He also admitted that testimony he had given on direct examination in this trial to the effect that he had taken thyroid injections during the test had omitted to include that he had independently been receiving thyroid prior to the test and had been given regular

injections by a physician in Atlantic City for this purpose, and that he had never told the defendants herein about this (R. 2062-2063). He also admitted that the Regimen Tablets might have affected the quantities that he ate, and that one of the pills had the effect of causing the food to be tasteless (R. 2059-2061). The cross-examination also brought out that he had never told Andre or Kastor-Hilton that he was starving himself, or that he was on a diet, and he admitted that no one had ever asked him to go on a diet (R. 2077-2080); in fact, the people at the advertising agency were not concerned with what he did, all they did was ask him how he was doing (R. 2080). He also stated that he had intended to carry out the test honestly, and he had never told anyone at the advertising agency anything to the contrary (R. 2097-2099).

The Government called Richard King, a former employee of Kastor-Hilton, who admitted that he knew Dorothy Bryce had been doing some dieting, but he basically denied all wrongdoing (R. 2224-2802).

Daniel J. Connolly, former comptroller and office manager at Kastor-Hilton, testified that on one occasion Richard King told him that Dorothy Bryce was taking Regimen Tablets and was on a diet (R. 2823). He also said that another Kastor-Hilton employee, George Bailey, had spoken disparagingly of the Regimen pills and said that the TV "commercial" endorsers could not lose much weight unless they were on a heavy diet (R. 2823-2827). On cross-examination Connolly admitted that in previous sworn testimony he had said that Bailey loves to talk and that many times what Bailey says is believable, and many times it is not believable (R. 2840-2841); the Court struck out another

statement by Connolly in this connection, to the effect that "you would have to know George Bailey. More than fifty percent of what George Bailey told you you didn't believe" (R. 2839-2840).

Dr. Richard Sands testified for the Government (R. 2876 et seq.). He was a medical doctor who had been employed by the co-defendant herein, New Drug Institute, in which the co-defendant Herrick was a Director.* In essence, Dr. Sands testified that Herrick and the New Drug Institute had prepared an unjustifiably favorable clinical report concerning Regimen Tablets, that Herrick had wanted to do this in an effort to please the client (Drug Research), and that to Dr. Sand's knowledge there was no indication that Andreadis or Drug Research were in complicity with Herrick (*ibid;* see especially R. 2879-2882). The Court instructed the jury that Dr. Sands' testimony was not to be considered by them for any purpose under the conspiracy proof, or on any issue of notice or scienter on the part of the defendants who were herein on trial but was to be considered only for the purpose of determining the clinical effectiveness of Regimen Tablets (R. 5791).

(It is of special interest that in connection with the above Sands testimony concerning Herrick's own attitude and motivations, the Court noted that nothing in the proofs received down to that point in this trial—our foregoing description of the testimony has been chronological—supplied any independent evidence of the existence of a conspiracy (R. 2907-2908).)

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* As recited *supra*, prosecution was dismissed as against Herrick, and New Drug Institute pleaded guilty to six counts of the indictment, not including the conspiracy count.

George Levine, a former employee of Kastor-Hilton, testified for the Government (R. 3025 et seq.). He was Kastor-Hilton's liaison with Andreadis and Drug Research. He said that in connection with one of the TV "commercial" personages, Gosfield, Andreadis had told him (Levine) to tell Gosfield to drink a large quantity of water prior to his first weigh-in, but that Levine had finally not carried out this instruction (R. 3131-3132). He also said that Andre had expressed dissatisfaction with one of the photographs of Lester Morris, and that a second photograph had been taken after Morris' shirt and pants were cut at the rear (R. 3158). Levine also testified to a number of dealings with publishing media which had objected to proposed Regimen advertising, and he testified concerning other criticisms and objections which he said had been discussed with Andreadis (R. 3185 et seq.). The Court instructed the jury that this latter testimony, and documents relating thereto, were not evidence on the question of effectiveness of Regimen Tablets as a weight reducing agent but wre only evidence as notice to the defendants that the claims made for these tablets were disputed (R. 5800). On cross-examination Levine absolved Andreadis of ever having indicated that he knew the TV endorsers were on a diet (R. 3490). He also said that when discussing with Andreadis certain of the criticisms that were being made of the Regimen Tablets, particularly those by the Better Business Bureau, Andreadis expressed indignation that he was being persecuted and told Levine that the Better Business Bureau had rejected an offer of $5,000 from Andreadis to conduct their own independent clinical tests of the tablets (R. 3494-3496). Indicating his own evidently sincere belief of the value of the Regimen Tablets, Levine said that during the

advertising campaign he had believed that Regimen caused weight control and that he had recommended the Tablets to his friends (R. 3502-3503). Levine had never told any of the TV "commercial" endorsers to go on a diet, and none of them had ever told him they were on a diet, but they did tell him they were taking the Regimen Tablets; and, like the witness King, Levine basically denied all wrongdoing (R. 3467-3553; and see the Trial Court's summary of Levine's testimony in the instructions to the Jury at R. 5792-5818).

(We note that, in view of the Trial Court's above mentioned announcement during the Sands' testimony that there was no independent evidence of conspiracy up to that time in the trial, the only other testimony in this case from which such independent evidence as to Andre and Drug Research could be even so much as suggested is the above described testimony of Levine; and we urge *infra* that this was manifestly insufficient.)

John A. Watters, an employee of Life Magazine, testified concerning certain dealings of the magazine with the Regimen advertising representatives, in which the magazine had at first rejected proposed ads because of dissatisfaction with the claims made therein; that subsequently the magazine had published Regimen ads; and that it was Watters' own opinion (even though he had approved the ads) that they were "false" (R. 3819-3862). This testimony was received over defense objection. The Court instructed the Jury that Life Magazine's expressions to the Regimen representatives were to be considered only on the question of notice or scienter and not as to the effectiveness of the drug (R. 5819). When asked on cross-examination

whether it had been proper and ethical to accept the advertisements in question, Watters answered "Technically so" (R. 3868). When asked whether he *knew* that the ads were false, he said "I believed it to be" (R. 3869).

George Bailey, a former employee of Kastor-Hilton, testified that he had knowledge of objections or criticisms concerning Regimen Tablets from the Better Business Bureau and from the Health Department of the State of Kansas (R. 3992 et seq.; R. 4001-4012), the defense strenuously objecting to this testimony—which the Court instructed the Jury was being received on the issue of notice or scienter (R. 5826). Bailey also testified that when Connolly asked him how the TV endorsers were losing weight, he told Connolly that they were probably dieting (R. 4031).

Phyllis Cunnyngham, a Kastor-Hilton copywriter, testified concerning some of the details of the formulation of the Regimen advertising copy in the effort to high-light the "no diet" idea (R. 4084 et seq.). We believe we may say that Miss Cunnyngham's testimony did not materially enhance the Government's case.

Ethel Rosenthal, secretary to Dr. Milton Plotz (who had been engaged by Herrick's company to observe and treat some of the TV "commercial" endorsers) testified as to certain of Dr. Plotz's office procedures and records (R. 4293 et seq.).

Dr. Arthur Grollman, a medical doctor, professor of medicine, a renowned authority on internal medicine and endrocrinology, author also of a widely used textbook which includes material on human obesity, testified for the Government (R. 4425 et seq.). Dr. Grollman's testimony is of spe-

cial interest because when he commenced his specific testimony concerning the effectiveness of Regimen Tablets his remarks were so technical that the Court politely informed the doctor that the discussion was, in effect, incomprehensible ("The Court: Well, Doctor, as a matter of fact I want to be very frank with you, I don't know what you said."—R. 4435). From that point on, throughout the remainder of his lengthy testimony, Dr. Grollman dealt with the issues solely and absolutely in terms of the stating of his own expert opinion, with references to professional consensus. His opinion was that the Regimen Tablets were not effective as a weight-reducing agent. We repeat, this conclusion was stated by Dr. Grollman solely as his opinion; he offered no scientific explanation or substantiation of this conclusory opinion because, again, his initial efforts to do so had proved incomprehensible to the Court itself. It is therefore of particular interest also that in Dr. Grollman's cross-examination he found himself obliged to qualify in significant respects his previously stated flat and unqualified rejection of Regimen Tablets as having no tendency whatever to act effectively as a weight reducing agent. See, especially, R. 4507-4508, 4518, 4521-4522, 4526-4527, 4529-4530. For example, Dr. Grollman admitted that in his noted textbook he had continued, until the 1965 edition, to include statements to the effect that PPA was used as a weight reducing agent (R. 4531-4539).

Evan Wright, Director of the Food and Drug Division of the Kansas State Department of Health, testified that he had verbally discussed the Regimen clinical reports with five Kansas physicians, and that thereafter he had determined that Regimen advertising should not be permitted in

that State (R. 4627, 4650-4657). He had informed George Bailey of Kastor Hilton of this decision (R. 4651-4652). The Court instructed the jury that this testimony was not being offered by the Government on the efficacy of the Regimen Tablets or on the validity of the clinical reports, but only on the question of notice to the defendants (R. 5849).

Kenneth Wilson, the President of the National Better Business Bureau, testified concerning the releases or bulletins by the Bureau which unfavorably criticized the Regimen Tablets (R. 4659 et seq.). This testimony was strenuously objected to by the defense (R. 4659-4675). The Court instructed the jury that this testimony was to be considered only on the question of notice and not in connection with the efficacy of the tablets (R. 5851). Wilson was also permitted to testify that he had had a meeting with Andre and Arthur Herrick at which Wilson read to Andre portions of a letter from a doctor and had conveyed to them other information, on the basis of which Wilson recommended to them that the claims made for Regimen Tablets be discontinued until better evidence of their efficacy could be obtained; and that Andre had rejected the recommendation because he disagreed with Mr. Wilson's views (R. 4675-4676, 4697-4714).

Antonio Godino, a clerk of the Criminal Court of the City of New York, was permitted over defense objections to testify concerning pleas of guilty which were made by the defendants under a New York State misdemeanor charge of false advertising for Regimen Tablets (R. 4786-4846). The New York State misdemeanor charges in question, and the guilty pleas, were under a "malum prohibitum" type of statute violation of which did not connote or import intent or willfulness, whereas the present indictment requires specific intent.

Leo Greenland, a partner of Smith-Greenland, an advertising agency, which had represented the defendant Drug Research herein late in 1961 after Kastor-Hilton had ceased to handle the account, testified for the Government that he had asked Andreadis for substantiation of the advertisements several times but had received none, and that in December 1961 he severed the relationship with Drug Research (R. 4851-4854).

The Government called five persons who had made retail purchases of Regimen Tablets and who testified that they did not lose weight; three of them also said that they had received refunds for these purchases pursuant to the guarantee (R. 4878-4918).

REASONS FOR GRANTING THE WRIT

Introductory

The opinion of the Court of Appeals rather extensively discusses the trial proofs, and it is evident that that Court deemed the Government to have proved a strong case. It is because we respectfully believe that the Government's proofs both as to the alleged inefficacy of Regimen Tablets to reduce weight and as to petitioners' intent to defraud were merely tendentious and far indeed from being sufficient to prove criminal charges of fraud, that we have devoted so much space in this petition to a description of the trial proofs. The errors urged in our "Reasons", *infra*, taken together with the insufficiency of the evidence, are

believed to justify reviewing this case to undo a miscarriage of justice.

Charges of mail fraud, wire fraud, misbranding and conspiracy in the fields of dietary medication and other pharmaceuticals have tended to become, in present day American life, of a frequently alarmist nature. Alarm over commercial or industrial irresponsibility in this area is entirely understandable, to say the least. Alarmism is something else again, especially when it involves the awesome processes of Federal criminal law enforcement and the dire governmental power of criminal punishment.

The "Reasons" which we advance *infra* possess, we think, one notably interesting element in common; each of our Reasons points, in one way or another, to an important element of slack due process procedure or other fundamental injustice in the trial of this sensationalized case which contributed to enabling the Government to obtain a jury conviction (and a Court of Appeals affirmance) on a trial *probatum* which could not have resulted in criminal condemnation of these petitioners if fair, traditional standards of proof and procedure in a criminal prosecution had been observed.

I

To avoid injustice, prosecutive intemperateness and an unseemly (and dangerous) feeding of public hysteria in the sensitive area of alleged pharmaceutical frauds, criminal prosecutions of the present type should be held to the strictest, not to the slackest, standards for proof of the legal elements of *fraud*. For a long time it was an unquestioned and apparently universal convention, or rule, in Federal

mail and wire fraud prosecutions, that the common-law fraud element of proof of actual fraud was not necessary for indictment or conviction. But in just the last few years a different view has begun to appear in some Federal courts, and it is this important (and we believe proper) new judicial development which forms the subject of this "Reason" I.

The Government in this prosecution barely bothered to introduce evidence of alleged victimization of any actual consumers, users or retail purchasers of Regimen Tablets under the fraud counts of the indictment; *and the indictment contains no allegations to that effect.* As noted, *supra,* the Government brought in a total of some three or four such "consumer" witnesses, whose testimony in any event was inconclusive, except that they got their money back on request. The Trial Court's own indifference to this phase of the proofs was indicated in its charge to the Jury at R. 5858-5859.

The within petitioners specifically requested the Court to charge the Jury that there must be proof that some person or persons were actually defrauded (Request to Charge No. 22, R. 5962-5963); see also defendant Kastor-Hilton's similar request to charge No. 23 (R. 5983-5984). Instead, the Court charged the Jury as follows (R. 5661-5662):

> "Under the mail fraud and wire fraud statutes under which the defendants have been indicted, it is not necessary that the scheme or artifice to defraud stated therein be actually successful in defrauding anyone."

Prior to the case of *United States* v. *Baren,* 305 F. 2d 527 (C.A. 2 1962), it seems to have been established doc-

trine under numerous Federal decisions* that allegations and proof of the offense of mail fraud under 18 U.S.C. § 1341 (and predecessor statutes) were sufficient when it was alleged and proved that the defendant had devised the statutorily prohibited scheme with the statutorily proscribed intent and that in pursuance thereof the mail had been used. There was no need apparently, under those prior decisions, to allege or prove that someone had actually been defrauded.

The *Baren* case, *supra,* seems to have been the commencement of a change in the decisional law on this subject which is of utmost significance, we submit. *Baren* affirmed a conviction for mail fraud in the selling of home knitting machines. The Bench consisted of Judges Swan, Moore and Smith. In the opinion, by Judge Moore, the legal-reasoning portion starts out with the following words (305 F. 2d at p. 528):

> "In every mail fraud case, there must be a scheme to defraud, representations known by defendant to be false and *some person or persons must have been defrauded.*" (Emphasis supplied)

The Court in *Baren* cited no authority for its above quoted statement of the elements "in every mail fraud case"; as above mentioned the earlier cases apparently were uniform in rejecting the idea that "some person or persons must have been defrauded."

As one reads further through the *Baren* decision, which consists largely of a very detailed analysis of the trial

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* See the cases in "Federal Digest" and "Modern Federal Practice" Under the topic "Post Office", Key Number 35.

proofs, one receives the impression that, although the Court seemed to be interested primarily in the question of whether intent to defraud had been proved—an emphasis which is consistent with the earlier cases—the Court nevertheless also kept referring to proof as to the victimization of particular purchasers of the knitting machines (see 305 F. 2d at pp. 531-534). In other words, the *Baren* case seems to treat in an intertwined way the questions of intent to defraud and of actual accomplishment of the fraud.

In arguing our appeal in the Court below (which had decided *Baren* three years previously) we suggested the tack which the Government might be expected to take concerning *Baren, viz.*, that *Baren* taken as a whole is less than a flat and explicit pronouncement that thenceforth every mail fraud case must include proof that someone was actually defrauded; that is, a Government lawyer might urge that the above quoted language in *Baren* may not have been intended to be taken literally the way it reads because the change from prior doctrine is so abrupt and the point is not further explicitly developed in the *Baren* opinion.

If the *Baren* case stood alone, such an argument by a Government lawyer might well pose difficulty for a defendant urging the contrary.

However, about a year and a half after the *Baren* decision the Sixth Circuit expressly adopted the above language of *Baren, verbatim,* i.e., quoting the language and citing *Baren. United States* v. *Rabinowitz,* 327 F. 2d 62, 76 (C.A. 6 1964). *Rabinowitz* reversed a mail fraud conviction and remanded with instructions to dismiss the indictment. *Rabinowitz,* like *Baren,* involved the sale of home knitting machines. *Rabinowitz* followed the pattern of *Baren* in analyzing the

facts from the standpoint of whether anyone had actually been defrauded, emphasizing that no one purchased a machine through the mail and that on the trial record before the Court every purchaser made the purchase after seeing the machine. The Court also noted that only 14 of 689 purchasers became witnesses for the Government.

Rabinowitz stands as a deliberate appellate ruling and holding for the point that mail fraud requires proof that someone was actually defrauded. And since *Rabinowitz* cited *Baren* for this point, *Baren* itself thereby emerged more definitely as authority for the same point.

But an even more significant development concerning this point occurred a few months after the *Rabinowitz* case, in *United States* v. *Brunet*, 227 F. Supp. 766 (W.D. Wis. 1964), where the issue was squarely presented, upon a motion to dismiss a mail fraud indictment, as to the sufficiency of the indictment in the light of the requirement that someone must actually have been defrauded. The indictment was sustained in *Brunet* on the ground that "the fact that persons were defrauded is clearly alleged in Count I where the Government states that money was obtained from certain persons. Furthermore, the matter of whether persons were actually defrauded is a question of proof and the Government will have to be prepared to substantiate the allegations of the indictment" (227 F. Supp. at p. 772). In arriving at this conclusion the Court in *Brunet* expressly discussed the defendant's contention "that it is a requisite of an indictment to charge a person with having successfully defrauded; that the mere attempt to defraud is not enough", and the Court noted that the defendant cited the *Baren* case for this contention. The Court then quoted the

pertinent language from *Baren*, it then also quoted the pertinent language from *Rabinowitz* citing *Baren*, it acknowledged that "there are cases which hold that it need not be shown that someone suffered a loss" and that the "Standard Instructions" in 27 F.R.D., p. 152 are to the same effect, and it concluded as follows:

> "However, the Court believes that inasmuch as the *Baren* and *Rabinowitz* cases, *supra*, are so recent, it is inclined to follow them in this and future cases. The Court will instruct the Jury that some person or persons must be defrauded."

It was immediately following the language above quoted that the Court then announced its further conclusion, previously quoted, concerning the sufficiency of the indictment in view of the inclusion therein of allegations that money was obtained from certain persons. See 227 F. Supp. at pp. 771-772.

We presented the foregoing authorities (together with the substance of our further discussion on this subject, *infra*) to the Court below, and that Court concluded, in effect, that *Baren* had not meant what it said, and that "The fact that other Courts in other Circuits have read *Baren* as meaning more than this is not determinative in this Court" (Appendix A hereto, *infra*, p. A14, fn. 12).

Nevertheless, on the basis of the above three decisions—*Baren, Rabinowitz, Brunet*—it is our respectful position that:

(1) At the very least, it is now proper for the defense in a Federal mail fraud prosecution *on substantive counts* to urge that the Government must prove at the trial (and that

the jury must be instructed) that some person or persons were actually defrauded, and that such proof must of course appear with respect to each substantive count. Whether such proof of actual defrauding would be sufficient solely upon a showing that money was paid, or whether the Government should be required to prove also that each allegedly defrauded person was actually a "fraud" victim in the full sense of all of the elements of fraud (being given a false representation, innocently and justifiably relying thereon, etc.), are important questions which were totally ignored by the Courts below in this case, because of their threshold view that there is no right to the basic jury charge that someone must be shown to have been defrauded.

(2) As to the conspiracy charges in the present indictment, relating to mail and wire fraud,* we realize of course that a conspiracy offense may be complete without achievement of the objects of the conspiracy. However, in the *Rabinowitz* case, *supra*, the convictions which were reversed *and the indictment which was ordered to be dismissed* included both substantive and conspiracy mail fraud counts. Furthermore, if we are correct that the substantive mail fraud counts are bad unless actual fraud is proved, then would there not inevitably follow a consequential and indeed direct *pro tanto* undermining, as it were, of the overt act paragraph in Count 46 (the blunderbuss adoption of all of the substantive counts as "overt acts")? That is, as to any substantive count on which the Government fails to prove that someone was actually defrauded, should not such be deemed stricken from overt act paragraph 1 in Count 46? *A fortiori*, if the substantive mail fraud counts

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* See *infra* as to proof of actual fraud in charges of wire fraud.

are dismissed for failing to allege that someone was defrauded, the overt act paragraph 1 would of course fall to that extent.*

The following additional considerations point strongly, we submit, to the jutsice and rationality of the rule of *Baren, Rabinowitz* and *Brunet*:

18 U.S.C. § 1341 (the mail fraud statute) is a "specific intent" statute. In a case where there is no proof that someone was actually defrauded, and if the rule be contrary to that in *Baren, Rabinowitz* and *Brunet*, every fair and sensible consideration of criminal jurisprudence dictates that the element of specific intent must be proved by the Government in a strong degree indeed. That is, the Government ought not be allowed to have its cake and eat it too. It ought not to be allowed to claim that specific intent has been proved in a case not involving actual fraud but merely attempted fraud, unless such intent is proved beyond a peradventure of doubt. And if the Government wants a looser standard for proof of specific criminal intent under this statute, it should not be allowed to claim that proof of actual instead of merely attempted fraud is unnecessary. Indeed § 1341 specifically speaks, in the alternative, of "*execution*" of fraud "or" *attempt* to do so. We therefore earnestly submit that if the Government's theory in a particular mail fraud prosecution is only that

* In connection with the *Baren-Rabinowitz-Brunet* rule mention should be made of a still later decision of the Second Circuit, *United States* v. *Press*, 336 F. 2d 1003 (C.A. 2, 1964), affirming a mail fraud conviction, Judge Dimock dissenting, where both the majority and the dissenting Judges reasoned the case throughout on the apparent assumption that the copious evidence offered by the Government which aimed at proof of actual fraud was standard procedure.

of "attempt", it should be held to the most rigid kind of standard of proof of specific fraudulent intent—a standard not remotely satisfied in the instant prosecution. And when the Government prosecutes on a theory of actual fraud, it is extremely unfair to allow the Government to be free of the duty of proving such actual fraud.

A fortiori, in the peculiarly sensitive contemporary area of alleged "marketing" fraud in the field of pharmaceuticals or dietary medications, so acutely exemplified by this case, the above-suggested principles of wise and fair law enforcement policy must be taken into account in the interpretation of the within applicable Federal criminal statutes. Immoderacy in the criminal prosecution of alleged consumer-market frauds can be as dangerous to the country and as inimical to law as immoderacy by unscrupulous purveyors or manufacturers. It is not difficult to envisage, given the unfortunately easy tendency towards public and official alarmism of the sort previously referred to, that the Federal "fraud" statutes may lead to unwholesome results affecting other lines of business which from time to time become the special targets of such nation-wide alarmism—what, for example, of automobile safety? A confirmation by this Court that Federal mail and wire fraud prosecutions should be subjected to the *Baren-Rabinowitz-Brunet* rule of proof of actual fraud would have a strongly beneficial tendency for balance and moderation. Again, it must be remembered that we are speaking here of *criminal* prosecution and *criminal* punishment. There is no reason, there is never any reason or any justification in a healthy civilized society, for allowing the processes of criminal law enforcement to suffer a fundamental deterioration of due process standards. Insofar as there is a need for gov-

ernmental protection of the public against serious market-fraud attempts without requiring proof of actual fraud, the Government does not lack *civil* remedies of a preventative or monitoring nature short of sending people to jail. Nor, we hasten to add, do we conceive for one moment that we are here asking this Court to intrude itself into matters of legislative policy. We are speaking of judicial interpretation of existing legislation which happens to be *criminal* legislation; we are speaking of the judicial function of applying traditional common-law meanings and standards in a traditional common-law area—*fraud*—which forms the basic subject matter of the Federal criminal legislation here under discussion.

As regards the wire fraud statute, 18 U.S.C. § 1343, the situation is even clearer—although there has not yet been a *"Baren"* or *"Rabinowitz"* case under that statute, and we realize that the decisions under that statute exclude the requirement of proof of actual fraud (as in the older mail fraud cases). The reason why we say the situation under § 1343 is even clearer than that under § 1341 is that § 1343 does not refer at all to *attempted* fraud but only to the actual *execution* of fraud. The salutary judicial attitude which produced the wholesome innovation of *Baren* (and the confirmatory decisions in *Rabinowitz* and *Brunet*) in regard to § 1341, should produce, on the high authority of this Court, a similar ruling as to the requirement of proof of actual fraud under § 1343. These two statutes are virtually legislative twins, and they should both be subject to the same rule in this respect.

We would respectfully point out also that if we are correct in the contention advanced in this Reason I, the error

in the judgments below taken as a whole must necessarily affect not only the mail (and wire) fraud counts, but all of the other counts in the indictment upon which petitioners were convicted, because of the "on the face" integral character of the indictment in its entirety. Cf. the Trial Court's observation near the outset of the trial that the proofs of misbranding were cardinal to the entire case (R. 87-91). Cf. also the conspiracy count with its incorporation by reference, both in the charging part and in the overt act paragraph, of all of the allegations under the mail fraud and the wire fraud counts. Cf. also the incorporation by reference in the wire fraud counts of the entirety of the respective prime substantive allegations in the antecedent mail fraud counts.

Certiorari is justified on the above grounds to vindicate the fair (and wise) administration of Federal criminal justice. It is also justified to resolve the conflict between the decisions below and the *Rabinowitz* and *Brunet* decisions.

II

Cutting through all the maze and all the mass of the trial proofs in this prodigious record, the reviewing reader will find that the ultimate structure point, in terms of an "anatomy" of this case, is the proof on the issue of whether the chemical substance known as PPA (phenylpropanolamine hydrochloride), the principal ingredient for weight-reduction in Regimen tablets, possessed efficacy for such purpose. In short, the ultimate cry of the prosecution in this criminal proceeding must be and has been, we may bluntly say, that Regimen is a fake.

But the ultimate question for a Court sitting in this criminal proceeding, either for trial or in review, is whether the Government's proofs did actually establish Regimen to be a fake under the tests of sufficiency of the proof for submission to a jury and for conviction under the rule of reasonable doubt.

We regret the necessity of burdening this Court with such prefatory truisms as the foregoing, but it is necessary that we do so, because in this Reason II we contend that, *as a matter of law under an analagously controlling decision by this Court* (*Reilly* v. *Pinkus,* 338 U.S. 269), the only properly determinative proof in this record on the issue of the medical efficacy of PPA was insufficient for the purposes of a criminal proceeding. Our above truisms, then, and our seemingly simplistic emphasis on this feature of the case, are done out of a need to restore perspective at the certiorari level. The medical proofs in this record on which the question of the efficacy of PPA must turn came from two witnesses, the previously mentioned nutrition professor, Jean Mayer, and the medical school professor Dr. Arthur Grollman. In our statement of the case, pp. 11, 18, *supra,* we have described the opinion testimony of the expert witnesses Grollman and Mayer. Manifestly this opinion evidence, in the form in which it emerged after being tested by the defense cross examination, fell far short indeed of establishing a *universality of scientific belief* that the representations of the defendants in regard to Regimen tablets were *wholly unsupportable*—this being the standard laid down by this Court as we show *infra;* nor, even, did the Grollman-Mayer opinion evidence establish to the requisitely impressive degree that the witnesses themselves had a *properly* founded scientific belief as to the alleged in-

efficacy of Regimen tablets. It will be recalled that Grollman, who was a far more distinguished medical authority than Mayer, had included in his noted textbook, down to the time of this trial, statements indicating widespread medical use of PPA for weight reduction. It will also be recalled that Dr. Grollman's efforts (on direct examination) to explain for the Court and the Jury the scientific basis for his opinions was deemed by the Court itself so incomprehensible, that Grollman (under the prosecutor's questioning) thereafter through the remainder of his testimony made no further efforts along those lines and contented himself merely with stating his opinions in a purely conclusory form. And it will be recalled that neither Grollman nor Mayer had made clinical tests of Regimen tablets or of PPA.

True, it is established law that expert opinion evidence in the fields of medicine and pharmacology may properly be received on the issue of intent to defraud, but it has also been at least strongly implied by this Court that such evidence is not sufficient for submission to the Jury or for conviction under the rule of reasonable doubt when it relates to a scientific subject matter in which there is controversiality of opinion, or where the scientific picture is in some doubt, or where, indeed, there is less than a "universality of scientific belief that advertising representations are wholly unsupportable". Thus, in *Reilly* v. *Pinkus*, 338 U.S. 269, which affirmed an order enjoining the execution of a post office fraud order (involving a weight-reducing treatment), the Court said (338 U.S. at p. 276):

> "Proof of fraudulent purposes is essential—an 'actual intent to deceive.' See Seven Cases v. United States, 239 US 510, 517, 60 L ed 411, 416, 36 S Ct 190, LRA1916D 164. Consequently fraud under the

> mail statutes is not established merely by proving that an incorrect statement was made. An intent to deceive might be inferred from the universality of scientific belief that advertising representations are wholly unsupportable; conversely, the likelihood of such an inference might be lessened should cross-examination cause a witness to admit that the scientific belief was less universal than he had first testified."

We take it that the standards as to the sufficiency of expert opinion evidence in criminal prosecutions for mail fraud or wire fraud on the issue of intent to deceive or to defraud are at least as strict as in post office fraud order cases. The Grollman-Mayer testimony in this case was, at best, of extremely questionable sufficiency under the test formulated in *Reilly* v. *Pinkus, supra.*

Even if we are not correct in urging that this Grollman-Mayer opinion evidence was insufficient for submission to the Jury or for conviction under the rule of reasonable doubt—we believe this contention is correct, however—there still should have been a proper instruction to the Jury reflecting the standard of *Reilly* v. *Pinkus.* The instruction to the Jury in this case was prejudicial because it was too general and failed to embody the standard of *Reilly* v. *Pinkus,* which was especially needful in this case where "universality of scientific beliefs" was surely not shown. The jury instructions on this subject appear at R. 5873-5874:

> "A word with respect to expert witnesses.
>
> The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions.

> An exception to this rule does exist as to those whom we call 'expert witnesses'. Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matters, in which they profess to be expert, and may also state their reasons for that opinion.
>
> You may recall there were doctors that testified in this case. You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should find that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely."

In the interest of proper administration of Federal criminal justice in the important field of enforcement of the marketing-fraud statutes, this topic of expert-opinion evidence compellingly calls for enunciation of a standard by this Court in keeping with the standard of *Reilly* v. *Pinkus, supra.*

III

Another main item which wrongly affected the scales of justice in this case was the reception in evidence of inordinately inflammatory and prejudicial *hearsay* disparagements of Regimen Tablets, admitted on a theory of notice or scienter. This hearsay impropriety worked unfairness in so atrocious a degree as to amount to a denial of due process of law—remembering, again, that this is a criminal prosecution.

During the direct examination of the witness Levine (formerly employed by Kastor-Hilton) the prosecutor asked the witness whether, in his liason dealings with petitioners Andreadis and the Drug Research Corporation, he had obtained knowledge of various announcements or other statements which had appeared in the public press and in other publicly distributed media constituting extremely hostile and unfavorable disparagements of Regimen Tablets (R. 3201 et seq.). These rank hearsay items included a New York Times story about an allegedly unfavorable clinical report, and "bulletins" widely disseminated by the Better Business Bureau which likewise referred to allegedly unfavorable medical findings or opinions concerning Regimen (R. 3204 et seq.). Examples of these items, as read to the jury over defense objection (*infra*), appear at R. 3301-3304.

The defense pleaded in vain with the Trial Court (R. 3204 et seq.) not to let the above-cited egregiously non-probative and destructively unfair material come to the attention of the Jury, on the ground that whatever interest the Government might have in "bringing home" to the defendants a supposed "notice" or "scienter" that the efficacy of Regimen Tablets was being questioned by assertedly authoritative persons, was incomparably outweighed by the prejudice to the defendants in letting the Jury receive this injurious material by which the Jury must inevitably be influenced to the prejudice of the defendants on the central *substantive* issues of the case—the issues as to the efficacy of Regimen Tablets and as to the alleged falsity of the defendants' claims in regard thereto. On these latter substantive issues the rank hearsay char-

acter of the evidentiary items in question would undeniably render them inadmissible, and we take it that no argument is needed in support of that proposition.

However, the prosecutor urged upon the Trial Court, with entire success, that *United States* v. *Press*, 336 F. 2d 1003 (C.A. 2 1964), cert. denied 379 U.S. 965, justified the reception of this inflammatory hearsay on the issue of the defendants' intent and good faith, i.e., as tending to show that the defendants, "after notice" of how bad their product allegedly was, still persisted in their allegedly evil course. Our efforts to demonstrate to the Court below the manifest inapplicability of the *Press* case were unavailing (see the extensive colloquy at R. 3204-3290). And, as above recited, the Court allowed the prosecutor to read to the Jury all of the inflammatory items (R. 3296 et seq.).

The differences between our case and the *Press* case could hardly be more profound, for the purposes of the issue of prejudice here presented. All that the *Press* case involved was certain quite specific *complaints*, which had been made by actual *customers* or *purchasers*, to the mail fraud defendants in that case, and it hardly needs to be pointed out that this kind of "notice" is a far cry from the situation in our case, where instead the "notice" came from *opinion* sources which were not only in no way in privity with our defendants but were "notifying" our defendants of supposed matters with which our defendants claimed that they disagreed, in all good faith and sincerity. Furthermore, what we may term the balance of prejudice

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* The Court of Appeals likewise rejected our contention (Appendix A hereto, *infra*, pp. A-17, A-18).

or injury to the respective interests of the Government and the defendants by the admission in evidence of the "notice" items, was incomparably more unjust to the defendants in our case than in the technically analogous situation in the *Press* case. In the *Press* case the final net effect of the challenged "notice" evidence was, after all, nothing more than to show that the Government's claims of mail fraud were in fact substantiated by the complaints of the ultimate defrauded victims themselves—a situation which, incidentally, does not exist in our case at all (at least in any legally significant degree) and which in fact is the subject of our Reason I, *supra*. In our case the non-probative and prejudicial matter in question could scarcely have been less than fatal to the defense, and with no remotely countervailing justification as regards a legally *proper* recognition of the Government's interests in this prosecution.

The door which was opened by the introduction of this inflammatory evidence *via* the examination of the witness Levine was well used indeed by the Government throughout the remainder of the trial, as the Jury were regaled with testimony by Kenneth Wilson, the prestigious president of the National Better Business Bureau himself, who was called by the Government to "drive home" the "point" (R. 4659 et seq.). Cf. the similar hearsay by the witness Evan Wright, of the Kansas State Department of Health, that he had barred Regimen advertising in Kansas after verbal discussions with physicians (R. 4627, 4650-4657).

Certiorari should be granted to redress the wrong above described, both because of the unfairness done to petitioners in this criminal proceeding and because of the departure from proper standards in the administration of Federal criminal justice.

IV

Still another wrongful weighting of the scales of justice against petitioners resulted from the prosecutor's improper conduct and collaboration with the author of a book and of an article in a mass circulation magazine both of which were intensely disparaging of Regimen Tablets, and both of which were published during the very midst of this trial.

Defendants moved for the withdrawal of a juror and a mistrial by reason of the prosecutor's dealings with Peter Wyden, author of the book entitled "Overweight Society" and of an article in T.V. Guide, both of which were published during the course of the trial. The book and T.V. Guide article were highly critical of Regimen, the latter referring to Regimen on its cover as "The Diet-Pill Fraud All America Watched" and the article being captioned "The case history of a successful T.V. campaign for a phony pill which reduced the viewer's pocketbook but little else." Two jurors indicated that they had the T.V. Guide in their homes but stated that they had not read it. The motion for mistrial was denied (R. 5157 to 5170, 5179 to 5181, 5286 to 5289, 5938 to 5940).

After the jury verdict a hearing on this issue, on a motion which was treated as a motion to set aside the verdict (R. 6136 et seq.; R. 5639), was held May 24, 1965. Martin R. Pollner, the Assistant who prosecuted the trial, testified that in March, 1964, while the defendants were awaiting trial on the indictment herein, he met Peter Wyden at his office; Wyden told Pollner that he was writing a book which included a chapter on Regimen (R. 5506-5508, 5512) and was seeking additional material for this chapter (R. 5508-9). Pollner said he told Wyden that he could not make any ex-

tra-judicial statements, but that he did make available to Wyden for examination certain depositions in the civil libel action which were then in his office (R. 5508-5510); these depositions had previously been filed in the Clerk's office (ibid). When Wyden returned to his office a second time to read the depositions of the civil case Pollner did not advise Wyden to read the depositions in the Clerk's office (R. 5528). Wyden made notes of his conversation with Pollner and the latter stated to Wyden that he did not want anything he said incorporated in a published book (R. 5509) since Pollner was concerned that the book might be published prior to or during the trial.

In the summer of 1965, Pollner received a manuscript of the book and examined the chapter on Regimen and noted that the only places where he was quoted dealt with the depositions, matters of public record (R. 5514, 5517). When he read the chapter in the manuscript, "While Millions Watched", he was concerned in view of the impending trial (R. 5518). He called Wyden and thanked him for the manuscript (R. 5517). He subsequently received a copy of the book either before the trial commenced or a week or two later (R. 5529). He called Wyden and said "My God, I hope no juror sees it" (R. 5518). Pollner discussed the book with Mr. Hoey, his superior, but he did not request Judge Bartels, who had been assigned as a "Rule 2" Judge, to exercise his judicial authority to request the publisher to delay formal publication of the book till the trial was terminated (R. 5522-A). He did not call counsel for defendants to advise them about Mr. Wyden's book; nor did he write to the publisher (R. 5523-5524). Pollner stated that he did not know who the publisher of the book was and when the book was received by him he did not communicate

with the publisher to ascertain if it had yet been released to the public; he did call Wyden to request the publisher to delay release of the book though he knew that was under the control of the publisher (R. 5543-5545).

The book was published on March 22, 1965, while the trial was in progress (R. 5529).

Wyden's book "The Overweight Society" was marked as Kastor-Hilton Exhibit A-1 for identification (R. 5537). On the flyleaf of the title page, in handwriting, was the inscription "To Marty Pollner—with best wishes and many thanks for everything—Peter Wyden" (R. 5538). Pollner said that the first time he saw the above inscription was while on the stand at the hearing (R. 5537).

Wyden testified it was Pollner who called him after he was subpoenaed and asked him if he had been subpoenaed and requested that he come to his office (R. 5553). When he appeared at Pollner's office, the latter stated that he wanted to review "some of the matters that were likely to come up" (R. 5554-5555). Wyden stated that in 1964 he was in Pollner's office on several occasions, and had repeated conversations (R. 5558, 5565, 5579). Asked if he had any discussion with Pollner concerning the depositions and what Wyden found in them he stated, "I probably did, yes, sir" (R. 5563). Though Pollner denied he knew who the publisher was, Wyden testified he furnished that information to Pollner (R. 5568, 5588, 5589). When he sent Pollner the manuscript of the Regimen chapter in September or October, 1964, he discussed its contents with Pollner (R. 5568-5572). He spoke to Pollner off and on during that winter because he not only wanted to update the chapter and know exactly when the case would go to trial but also

to inform Pollner that the book was going to the printer in December, 1964 (R. 5571). Wyden's book was released for publication on March 22, 1965 and he advised Pollner of the actual date of the release (R. 5576-5578). *There never was any discussion about holding up the publication of the book* (R. 5580, 5587). Prior to December, 1964 when the book went to the printer, he discussed with Pollner the fact that it might have some impact upon the trial (R. 5587) but Pollner never asked him to make any effort to delay release of the book nor did Wyden do so (R. 5588).

Wyden testified that there was never any conversation with Pollner with respect to depositions on file in the Clerk's office, nor did he go to the Clerk's office (R. 5592-5593).

In March, 1965 when Wyden entered into negotiations with T.V. Guide to publish a condensed version of the Regimen chapter of his book, he knew the trial was in progress and he advised Pollner of his arrangements with T.V. Guide (R. 5603). Pollner was unhappy about this but did not ask Wyden to insure that it would not be published during the trial (R. 5604). Wyden discussed with the editorial staff of T.V. Guide the fact that the trial was in progress and that his article on Regimen would consequently have greater public interest if published at that time (R. 5609).

There was testimony that the circulation of T.V. Guide in March 1964, in the New York metropolitan area was 8,826,569 (R. 5617).

John H. Hughes, an officer and one of the editors of William Morrow & Company, publisher of "The Over-

weight Society", testified that the first tentative publication date of the book was March 1, 1965 which was changed to March 25, 1965; that Pollner never requested delaying the publication of the book; and that 13,000 copies of the book were shipped in the Metropolitan area (R. 5618-5620).

Pollner was recalled and testified that in March, 1965, Wyden called and advised him that a condensation of the Regimen chapter of his book would be published in T.V. Guide (R. 5622); that he did not advise counsel or Judge Bartels of the proposed publication (R. 5623-5624). Asked if at the time of Wyden's call with reference to the proposed article in T.V. Guide, he was aware of Judge Bartels' instruction concerning publicity, he answered inconclusively (R. 5626-5629).

At the conclusion of the hearing the Court stated that since none of the jurors had read either the Overweight Society or the issues of the T.V. Guide, the application to set aside the verdict by reason of Mr. Pollner's conduct was denied; the Court further stated that since Mr. Pollner's conduct was not before him he made no finding with respect thereto (R. 5639-5640).

In *United States* v. *Bufalino*, 285 F. 2d 408, 420 (C.A. 2 1960), the Court (*per* the concurring opinion of Judge Clark in which Chief Judge Lumbard and Judge Friendly joined on the point in question) denounced the above kind of publicity actions by Federal prosecutors done during the course of a highly publicized criminal trial (the "Apalachin" trial in that instance).

Again, this Court should apply its corrective hand, by granting certiorari, in the interests of the decent administration of Federal criminal justice.

V

Still another instance of the probative and procedural slacknesses which, we contend, brought about the unjust convictions in this case, is that the proof under the conspiracy count was insufficient for submission to the Jury or for conviction under the rule of reasonable doubt. If the conspiracy convictions fall, the convictions on the related substantive counts (mail and wire fraud) cannot stand because of the integrated character of the indictment and the prejudicial effects of the conspiratorial hearsay evidence.

As noted in the statement of the case, *supra,* the Trial Court declared to counsel in connection with the testimony of the witness Dr. Sands that up to that point in the trial the Court had not seen sufficient independent evidence of a conspiracy for submission to the Jury. This meant that the only pre-Sands witnesses whose testimony might have sufficed for this purpose—the T.V. "endorsers" (Bryce, Antonacci, Morris) and the former Kastor-Hilton employees (King, Connolly)—had testified to nothing that would justify the submission of the case to the Jury on the conspiracy count; or, it would seem, that would justify the innumerable "subject to connection" items of conspiracy "hearsay."

The only subsequent witnesses—i.e., subsequent to Dr. Sands—from whose testimony the alleged conspiracy between Kastor-Hilton and Drug-Research Andreadis* was theoretically provable were the former Kastor-Hilton em-

* It will be recalled that the alleged conspiracy link involving the defendants Herrick and New Drug Institute had been eliminated from the case by the Trial Court; the only remaining defendant Miklean, was undisputedly without significance for the conspiracy charges against the within petitioners.

ployees George Levine, George Bailey and Phyllis Cunnyngham, and the secretary of the deceased Dr. Milton Plotz (Ethel Rosenthal). Of these latter, the only one requiring further discussion is Levine, who in effect exculpated Andreadis and Drug Research of any wrongdoing or wrongful knowledge. For the foregoing reasons we respectfully take the unequivocal position that the conspiracy charged in this indictment was not proved, simply as a matter of the manifest deficiencies of the trial proofs. Cf. *United States* v. *Bufalino*, 285 F. 2d 408 (C.A. 2, 1960); *United States* v. *Cianchetti*, 315 F. 2d 584 (C.A. 2, 1963).

If the conspiracy convictions herein fall for failure of proof—as we contend they should—the case then unavoidably presents the question of prejudicial reception of conspiracy hearsay without segregation thereof in regard to the substantive counts. Cf. *United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2, 1963).* And especially in view of what we may term the integrated character of this indictment—in which not only the substantive mail and wire fraud counts incorporate each others' major allegations by reference, but in which also the conspiracy count incorporates all of the mail and wire fraud allegations as "overt acts"**—this prejudicial effect of the conspiracy hearsay becomes decisive.

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* Even in a conspiracy prosecution as such, the question of admission of such hearsay testimony has continued to be regarded as one of peculiar difficulty. *Deli Paoli* v. *United States*, 352 U.S. 232; *Lutwak* v. *United States*, 344 U.S. 604; *Krulewitch* v. *United States*, 336 U.S. 440.

** It is fair also to say, we believe, that the conspiracy hearsay in this trial could not but have been instrumental in the jurors' minds in connection with the misbranding counts (on one of which, Count 57, the within petitioners were convicted).

VI

Finally, the circumstances relating to the conviction on one (out of the twelve) misbranding counts shed a revealing light on the injustice and indeed on the irrationality of this criminal prosecution. We contend that there was a failure of proof on the single conviction count of misbranding; and that petitioners were denied a fair trial on the misbranding charges as an integral and inescapable consequence of the denial of fair trial under the indictment charges as a whole, and because of the strong indications that the Jury rendered a compromise verdict with respect to the misbranding charges.

The misbranding counts, under this multiple-count indictment, were for all practical purposes treated by the Government and the Trial Court as integral with the mail fraud, wire fraud, and conspiracy counts; indeed, the Government (with the Court's approval) commenced its proofs in this trial with evidence under the misbranding counts (testimony by inspectors of the Food and Drug Administration concerning purchase of Regimen Tablets and observation of advertising displays in stores), on the expressly stated theory (R. 87-91) that this evidence would be basic to the proofs under the entire indictment (R. 70-310).

The still more interesting fact in this regard is, furthermore, that—and we have no desire to oversimplify but we think the statement we are now to make is entirely fair—from there on in this trial it became very difficult to discern any clear further thread in the Government's proofs under the misbranding counts; and even in the Court's instructions to the Jury concerning those counts and the proof

relating thereto, one comes away with the unsatisfied feeling that it is hard to tell what this case was about insofar as it was supposed to have been presented to this Jury as a "misbranding" case.

Little wonder that the Jury disagreed on eleven of the twelve misbranding counts. Little wonder that the case, in regard to this segment of the indictment, strongly bespeaks not merely a "compromise" verdict but a verdict in which a thoroughly confused jury arbitrarily decided to give "something" to the Government and "something" to the defendants.*

The specific charge involved in the single misbranding conviction count (Count 57) involved a certain delivery of cartons of Regimen Tablets to a store in Chicago. Quite similar deliveries (we say this without, of course, conceding the alleged criminal character thereof) were proved under the other misbranding counts, so that the explanation of the Jury's disagreement under those other counts cannot be found in any distinction as regards the proof of the respective misbranding counts on that score.

It does seem difficult to avoid the conclusion, then, that the Jury's overall verdict on the misbranding counts, being not rationally explainable in any other way, has to be explained as the result of compromise generated arbitrarily by a hopeless bewilderment or cognitional frustration on the part of the triers of the facts.

And our reason for emphasizing this evident incomprehensibility of the Jury's verdict on the misbranding counts

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* We return to this indicated compromise-verdict aspect *infra*.

is, again, that it must denote not only the Jury's inability to cope with the misbranding counts in themselves by reason of the obscurity of the misbranding proofs as they finally shaped up in the trial proofs as a whole, but that it tends strongly to confirm also our above suggested theme that the misbranding counts in their entirety became amalgamated, or osmotized, if we may so express it, with the mail-wire fraud and conspiracy charges in this trial; and we say that this happened not only in the jurors' minds, but also in the Trial Court's mind and even in the prosecutor's own planning and conduct of his case. That the misbranding side of the case thus lost distinctness in the Trial Court's own mind is suggested by the notably rudimentary and uninformative character of the Court's instructions to the Jury on the misbranding counts—something that was atypical in an otherwise unusually systematic charge by a trial court to the Jury (R. 5646-5650, 5670, 5681-5685, 5691-5696)—summarizing the FDA inspectors' testimony without even noting the supposed misbranding connections. The Jury's difficulty with the misbranding counts is shown by their requests for additional information at R. 5905-5909, 5915-5916.

This absorption of the misbranding charges and proofs into the other portions of the indictment during this trial entitles us to urge, then, that the various trial errors argued by us in earlier points of this petition must of right be considered for their impact upon the justness of the judgment of conviction under the single misbranding count upon which the Jury found petitioners guilty. If those errors require reversal under the mail-wire fraud and the conspiracy counts, the pervasiveness of those errors in relation

to the misbranding count requires reversal of the conviction under the latter count. It is impossible under this record to see how it can be said that petitioners had a fair trial on the misbranding charges, if it is concluded that they were denied a fair trial on the fraud and conspiracy charges with which the misbranding charges were made so thoroughly integral and so confusedly inter-absorbed in this trial.

It is to be remembered that the misbranding charges here involved are laid under a statute whose *felony* penalty depends upon proof of "intent to defraud or mislead" (21 U.S.C. § 333(b)). This is not one of those Federal food and drug cases where the defendant faces merely a *malum prohibitum* charge which does not require specific criminal intent. Cf. *United States* v. *Dotterweich*, 320 U.S. 277.

The misbranding conviction herein, then, must be tested, equally with the fraud and conspiracy convictions (from which we claim it is inseparable in any event for the reasons above mentioned), under the test not merely of alleged falsity but of intentional falsity.

Conclusion—and prayer in view of the indicated compromise verdict.

In our last preceding Reason (VI), we noted the strong indications that the Jury's verdict on the single conviction count for misbranding was a compromise verdict, and that the integral connection between the misbranding phase and the other phases of this case strongly bespeaks the just need to view this questionable character of the verdict in its relation to the case as a whole. We realize that "inconsistent" verdicts have tended to cease to be a ground for appellate complaint in the Federal courts. But we cannot

believe that the expressions of odium which this Court has voiced concerning such verdicts when they are not merely inconsistent but also smack of a compromise character, have altogether lost significance. *Hyde* v. *United States*, 225 U.S. 347; see also 53 *Am. Jur.* 714 (*Trial*, § 1033). At the very least, upon a trial record which, like the instant one, so strongly imports the likelihood of a jury "compromise" in a setting of indicatedly confused verdicts and practically disseverable multiple indictment charges, the principle should be applied that the record must be closely examined for injustice. Cf. *Manley* v. *United States*, 283 F. 2d 211, 222 (C.A. 6 1956).

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioners John Andreadis and Drug Research Corporation

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 277—September Term, 1965.

(Argued March 23, 1966 Decided September 1, 1966.)

Docket No. 29912

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOHN ANDREADIS a/k/a JOHN ANDRE and DRUG RESEARCH CORPORATION,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and MOORE, *Circuit Judges.*

Appeal from judgments of conviction, United States District Court for the Eastern District of New York, Bartels, *J.*, entered upon jury verdicts of guilt.

An indictment containing 58 counts was filed against appellants and others. Trial proceeded against appellants and one other only. Of the 58 counts, 18 charged mail fraud in violation of 18 U.S.C. §§1341 and 2, 27 charged wire fraud in violation of 18 U. S. C. §§1343 and 2, one

charged a mail-and-wire fraud conspiracy in violation of 18 U. S. C. §371, and 12 charged misbranding under 21 U. S. C. §§331(a), 33(b) and 18 U. S. C. §2. At the conclusion of the Government's case a motion for a judgment of acquittal was granted as to two of the mail fraud counts but all other counts were submitted to the jury at the conclusion of all the evidence. Both appellants were found by the jury to be guilty of the 16 remaining counts of mail fraud, all 27 counts of wire fraud, the conspiracy count, and one of the misbranding counts. No verdict was returned as to the remaining eleven misbranding counts.

The judgments of conviction are affirmed.

JOSEPH P. HOEY, U. S. Attorney, E. D. N. Y.; Jonathan L. Goldstein, Attorney, U. S. Dept. of Justice; Jerome C. Ditore, Asst. U. S. Attorney, *for Plaintiff-Appellee*.

MAURICE EDELBAUM, New York City, for *Defendants-Appellants*.

WATERMAN, *Circuit Judge*:

Appellants, John Andreadis, a/k/a John Andre, and Drug Research Corporation, a company that Andre controlled, appeal from judgments of conviction entered after a jury trial before Judge Bartels in the United States District Court for the Eastern District of New York. Appellants were indicted, tried, and convicted on forty-two counts of knowingly using either the United States mails or radio and television communication in interstate com-

merce, in furtherance of an intentional scheme to defraud prospective purchasers of the product "Regimen Tablets" by false or fraudulent pretenses, representations and promises in violation of 18 U. S. C. §§1341 (mail fraud)[1] and 1343 (wire fraud);[2] on one count of conspiring to violate the federal statutes just cited in violation of 18 U. S. C. §371; and on one count of causing to be introduced and delivered in interstate commerce, with intent to defraud and mislead, a quantity of cartons of a product labeled "Regimen Tablets," together with a display kit, which contained statements that were false and misleading in violation of 21 U. S. C. §§331(a), 333(b) and 18 U. S. C. §2. We find no error and affirm the judgments on all counts.

"Regimen Tablets," manufactured for, and sold by, appellants, consisted of supplies of three pills, a green pill containing 22.5 mg. of benzocaine plus vitamins and minerals that was supposed to deaden the tonge and sense of taste; a pink pill containing 648 mg. of ammonium chloride and various vitamins that was supposed to act as

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[1] This section provides in relevant part as follows:

Whoever, having devised . . . any scheme or artifice to defraud . . . by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice . . . places in any post office . . . any matter or thing whatever to be sent or delivered by the Post Office Department . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[2] This section provides in relevant part as follows:

Whoever, having devised . . . any scheme or artifice to defraud . . . by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice shall be fined not more than $1,000 or imprisoned not more than five years, or both.

a diuretic; and a yellow pill containing 75 mg. of phenylpropanolamine (PPA) that was supposed to act as an appetite depressant. Boxes of "Regimen Tablets" were sold, without prescription, over-the-counter, in two sizes: a $3 box containing 78 tablets, a so-called 10 day supply; and a $5 box containing 156 tablets, a so-called 20 day supply.

For a period of years between the mid-1950's and 1962, when the Federal Drug Administration finally removed "Regimen Tablets" from the market, appellants devised and executed a scheme to merchandise this product as a miracle weight-reducing drug. At the start Drug Research Corporation, controlled by Andre, who was also its President,[3] used mail order advertising to sell "Regimen Tablets." The advertising material mailed to the public claimed that "Regimen Tablets" was a new "wonder drug for fat people" that made possible "no diet reducing" and that without dieting, special eating, or giving up "the kinds of food you like to eat" the pills would cause "your body to lose weight the fastest acting way. . . ." In 1957, Andre retained Kastor-Hilton, Chesley, Clifford & Atherton, Inc. (hereinafter Kastor-Hilton), an advertising agency, to develop advertising copy to be placed in various national media.[4] Kastor-Hilton remained Andre's advertising agency for the "Regimen Tablets" account until 1961. During that time reliance on mail order advertising to sell the product

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[3] In effect Andre *was* Drug Research Corporation and throughout this opinion we will refer to both as Andre.

[4] Kastor-Hilton was a codefendant below. It was found guilty of having violated, on several counts, 18 U. S. C. §§1341 and 1343, and of having conspired so to do in violation of 18 U. S. C. §371. It has not appealed its conviction.

was replaced by reliance on more sophisticated advertising techniques. Kastor-Hilton arranged for advertisements to be placed in the newspapers of every major city in the country, in magazines of national circulation, and on programs televised on all the major networks, which claimed that "Regimen Tablets" made possible "no-diet" reducing, or reducing "without dieting" and that the pills had been "clinically tested" or "proven clinically effective." In certain instances these claims were qualified when a national magazine or television program refused to accept the "Regimen Tablets" copy as first submitted by Kastor-Hilton, but Andre agreed to such changes grudingly and he ordered Kastor-Hilton to retain these extravagant claims in the copy submitted to other, less particular, media. Without much doubt, the most successful of the advertising schemes devised by Kastor-Hilton for "Regimen Tablets," and assuredly the most spectacular, involved the use of "endorsers," that is, individuals who for a period of time would appear each week, "live," on a television program, demonstrate their weekly weight loss, which usually was quite substantial,[5] and state *inter alia* that they were losing the weight while eating the foods they normally ate and "without dieting," that, "thanks to Regimen Tablets [they] felt satisfied with a fraction of the calories [they] used to eat. . . ," and that they "never felt better."

Each of the counts charging a scheme to defraud by means of false or fraudulent pretenses, on which appellants were convicted, set forth a specific instance in which

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[5] Endorser Bryce lost 25 pounds in six weeks; Endorser Antonacci lost 12 pounds in fourteen days.

the United States mails or interstate radio or television communication had been utilized by appellants to disseminate their advertising claims that "Regimen Tablets," taken as directed, would cause a person of normal health to lose weight "without dieting," or that this product made possible "no-diet reducing" and that it had been "clinically tested" or "proven clinically effective." The thrust of the Government's case was that there was here an intent to defraud because these representations and statements were scientifically and factually false, and yet appellants continued to include these representations and statements in their advertisements for "Regimen Tablets." [6] It is the Government's contention that proof of these facts sufficed to convict appellants under 18 U. S. C. §§1341 and 1343 on each of the counts on which they were convicted. This contention will bear some further analysis.[7] But, assuming for present purposes that the Government is correct and that proof of this set of facts warrants the conclusion that 18 U. S. C. §§1341 and 1343 were violated, the essential issue before us becomes that of determining whether the Government adduced evidence sufficient to support the jury's determination that this set of facts existed in every instance in which it returned a verdict of guilty.

At the outset we note that, first, on appeal from a jury conviction we must view the evidence in the light most

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[6] On appeal appellants do not argue that the Government failed to make out its case with respect to certain counts in the indictment but not with respect to other counts. Thus it suffices to review the Government's case generally as it relates to all the counts on which appellants were ultimately found guilty.

[7] See pp. 3197, 3200 *infra*.

favorable to the Government, *United States* v. *Press*, 336 F. 2d 1003, 1009 (2 Cir. 1964), *cert. denied*, 379 U. S. 965, 973 (1965), and second, when the verdict of the jury is attacked for an alleged lack of evidence to support it, the verdict will not be set aside if it is supported by substantial evidence, e.g., *United States* v. *Valenti*, 134 F. 2d 362 (2 Cir.), *cert. denied*, 319 U. S. 761 (1942). Within this perimeter of the area of permissible review, we hold that the Government presented evidence sufficiently probative to support its claims that certain representations and statements found in most advertising for "Regimen Tablets" were scientifically and factually false, that appellants knew them to be false, and, despite this falsity and appellants' knowledge thereof, appellants continued to include these representations and statements in their advertising. A brief summary of the evidence tending to support these claims follows:

In order to establish that appellants' advertising claims were scientifically false the Government introduced two expert witnesses, Dr. Jean Mayer and Dr. Arthur Grollman, both of whom were well-qualified to assess the scientific merit of the claims that "Regimen Tablets" would cause a person to lose weight "without dieting," and would make possible "no-diet reducing." Taken together, the testimony of Drs. Mayer and Grollman almost conclusively established that a dostage level of PPA double that found in "Regimen Tablets" would not, even when combined with the other ingredients found in "Regimen Tablets," cause a loss of weight unless accompanied by a diet. Dr. Grollman also testified that certain Andre-sponsored clinical tests of the effectiveness of "Regimen Tablets" could not have

produced valid scientific results and that the results of these Andre-sponsored clinical tests were flatly contradicted by the Fazekas test, a test of the effectiveness of PPA recognized as authoritative by experts on the problem of obesity.

In order to establish that appellants knew that the claims they made for "Regimen Tablets" were scientifically false the Government introduced evidence tending to prove that several impartial observers had called Andre's attention to the mass of material that cast fundamental doubt on the truthfulness of the claims made for "Regimen Tablets," but that Andre had ignored all requests that he modify his advertising unless he could substantiate his claims and had only diluted his claims when prominent advertising media had refused to run the undiluted claims, and even then had only diluted the copy supplied to the media that objected. For example, it was established that throughout the period of the poularity of "Regimen Tablets" the National Better Business Bureau compiled the comments of organizations, like the American Medical Association and the New York Academy of Medicine Consultants, that had expressed doubts about the effectiveness of "Regimen Tablets," and that the Bureau had brought these well-documented expressions of doubt to the attention of Andre and his associates in the hope that the extravagant unsupported claims would be withdrawn; and that the attempts of the Bureau were entirely unsucessful, even when the Bureau's President personally carried its case to Andre in October 1957. On several occasions several advertising media detailed to Andre and his associates their doubts as to the effectiveness of "Regimen Tablets" and the truth-

fulness of the scientific claims made for the products. The Kansas State Board of Health refused to allow "Regimen Tablets" to be advertised in Kansas on the ground that the Andre-sponsored clinical studies did not substantiate the claims made for "Regimen Tablets." Although Andre knew this, his only response was to dispatch an agent to Kansas in an attempt to get the Kansas Board to reverse its position. Finally, it was established that in July 1959 a Better Business Bureau bulletin and an article in the New York Times reported the results of the clinical study conducted by Dr. Joseph F. Fazekes of the District of Columbia General Hospital, and others. This study, recognized as authoritative by experts on the problem of obesity, concluded that those patients who had taken the "Regimen" dosage of 75 mg. of PPA, as well as double that dosage, lost no more weight than those taking a placebo. Andre and his associates knew of this report and discussed its conclusions but nevertheless failed to modify the advertising claims made for "Regimen Tablets." We think this evidence substantially supports the Government's position that the "without dieting" and "proven clinically effective" claims made by appellants for "Regimen Tablets" were scientifically false, that appellants knew they were false, and that, knowing of the falsity, they nevertheless continued to include these claims in their advertising.

We find equally convincing the Government's evidence that many of appellants' advertising claims were factually false, that appellants knew these claims to be false, and that they nevertheless continued to include them in their "Regimen Tablet" advertising. Most of the Government's evidence, relating to this branch of its case, concerned

statements made by various of the "live" endorsers. Since this evidence was largely cumulative we think it suffices for our purposes to summarize the Government's case as it related to the first of the "live" endorsers only, a Mrs. Dorothy Bryce. Mrs. Bryce stated on national television that until she began to take "Regimen Tablets" she had been unable to lose weight, that "without dieting" the tablets had caused her to lose 25 pounds in six weeks, and that she "never felt better" than she did during this period of rapid weight loss. In fact, as Mrs. Bryce testified at trial, she had previously successfully reduced her weight through dieting, she had continued to diet strenuously during the six week period in which she lost the 25 pounds,[8] and she became ill during this period of strenuous dieting. Other "live" endorsers also testified that they strenuously dieted in order to lose weight, and then attributed this weight loss to "Regimen Tablets" during their nationwide television appearances.[9]

In order to establish that appellants knew the statements made by the "live" endorsers were factually false the Government first introduced testimony of the endorsers to

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[8] During the first three weeks she ate only lean meat, lettuce, tomatoes, grapefruit and boiled eggs. By the middle of the fourth week her daily meal was: half a grapefruit, yogurt, and a small piece of lean meat or fish. During the sixth week she began to eat only a half grapefruit and some yogurt each day, and during the last days of that week she had only black coffee and cigarettes.

[9] In order to prove appellants' advertising claims were factually false the Government also introduced appellants' pleas of guilty to certain counts contained in a New York State information, filed on June 10, 1960, charging them, and Kastro-Hilton, with violating Section 421 of New York's Penal Law, which proscribes untrue and misleading advertisements. N. Y. Penal Law, §421.

the effect that they had been instructed to diet when they were hired. George Levine, the liaison between Kastor-Hilton and Andre, corroborated this by testifying that when Andre interviewed endorsers he invariably asked them whether they had dieted before and impressed upon them the fact that "Regimen will not burn off fat!" The Government also introduced substantial evidence tending to prove that many of Kastor-Hilton's employees, including Richard King, who was in control of the "live" endorser campaign, knew that Bryce and the other endorsers were dieting. George Bailey, a former account executive for "Regimen Tablets," testified that there was much general discussion at Kastor-Hilton to the effect that the endorsers were dieting. Finally, the Government established that Kastor-Hilton kept Andre well informed about the progress of the "live" endorsers' campaign, and that Andre in turn supervised that campaign closely. Viewed cumulatively, the evidence adduced by the Government convincingly established that many of the claims made by the "live endorsers" were factually false. The Government's evidence was also sufficient to support the proposition that appellants knew these claims were false. The Government did not prove that Andre specifically directed Kastor-Hilton to advertise the factually false claims, knowing them to be false, but as he reviewed and approved the "live" endorser campaign this does not insulate him from liability for their propagation. *Harris* v. *United States*, 261 F. 2d 792, 796 (9 Cir. 1958), *cert. denied*, 360 U. S. 933 (1959). Andre's agent, the Kastor-Hilton agency, certainly knew that the endorsers' statements were factually false and it was permissible for the jury to infer that

Kastor-Hilton, through Levine, conveyed this fact to Andre.[10] *United States* v. *Press, supra,* at 1009; see *United States* v. *Lichota,* 351 F. 2d 81 (6 Cir. 1965), *cert. denied,* 382 U. S. 1027 (1966). The jury's verdict may be upheld on this ground alone, but we add as an alternative ground for upholding it that a person in Andre's shoes should not be able to insulate himself from liability under 18 U. S. C. §§1341 and 1343 by contending he was not told that the claims made for his product by his advertising agency were false, even if the contention should happen to be true. We would hold, if it were not so clear that we need not reach the point, that Andre had some affirmative duty to insure that the claims the agency made for "Regimen Tablets," his product that he had arranged to have advertised by the agency, were true. See *United States* v. *Baren,* 305 F. 2d 527, 532 (2 Cir. 1962); *Stone* v. *United States,* 113 F. 2d 70, 75 (6 Cir. 1940). A person in Andre's shoes, having failed totally to discharge this responsibility in even the slightest measure, should not be permitted to escape the consequences of his inattention.[11]

Before this court, appellants raise no substantial question as to the sufficiency of the evidence adduced by the Government and summarized above. Appellants do advance nine grounds that they urge require us to reverse the judgments of conviction entered below. They first urge

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[10] Thus we do not decide, and need not, whether Kastor-Hilton's knowledge that the claims were false should in any event be imputed to Andre on the ground that the former was the agent of the latter.

[11] We state this as an alternative ground in order to make it clear that we are holding that the Government sufficiently proved that Andre knew the claims were false.

that all the convictions for violating 18 U. S. C. §§1341 and 1343 must be reversed, because the Government failed to adduce proof of an essential element of guilt under those sections. Second, appellants argue that alleged prosecutorial misconduct denied appellants a fair trial. Appellants raise four questions concerning the admission of allegedly inadmissible evidence, each of which they contend requires reversal. One portion of the trial court's charge to the jury is alleged to have denied appellants a fair trial because it was hopelessly confusing. Finally, appellants argue there was insufficient evidence to convict on the conspiracy count and on the misbranding count, and they raise several other questions that relate to the misbranding count alone. We turn to consider each of the grounds for reversal urged by appellants.

Appellants argue that all the convictions for violating 18 U. S. C. §§1341 and 1343 must be reversed because the Government failed to prove, as to each of the substantive counts on which they were convicted, that some person or persons were actually defrauded. Appellants recognize that the great weight of authority is to the effect that in prosecutions for mail fraud or wire fraud it is not essential that the Government allege or prove that purchasers were in fact defrauded. E.g., *Pereira* v. *United States*, 347 U. S. 1, 8 (1954); *Gusow* v. *United States*, 347 F. 2d 755, 756 (10 Cir.), *cert. denied*, 382 U. S. 906 (1965). They also recognize that this is the settled rule in this circuit for wire fraud prosecutions, e.g., *United States* v. *Whiting*, 308 F. 2d 537, 540 (2 Cir. 1962), *cert. denied*, 372 U. S. 909, 919 (1963), and that this rule, in this circuit, has long been

considered equally well settled in prosecutions for mail fraud. E.g., *United States* v. *Rowe*, 56 F. 2d 747, 749 (2 Cir.) (L. Hand, *J.*), *cert. denied*, 286 U. S. 554 (1932). Nevertheless, they argue that this court in *United States* v. *Baren*, *supra*, reversed this established rule and that proof that purchasers were defrauded is now required in all mail fraud prosecutions; they argue further that the "logic" of this new *Baren* rule requires its application to wire fraud prosecutions as well. We disagree. To be sure, this court did state, in passing, in *Baren*, that "in every mail fraud case, there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded." 305 F. 2d at 528. But we think it clear that the *Baren* panel did not intend that this statement should overrule prior decisions in this circuit, for no mention was made of these prior cases, nor was it stated that a new rule was being formulated. Moreover, had a member of the court believed that *Baren* had overruled *United States* v. *Rowe*, *supra*, and its progeny, the decision would have been committed to all the qualified judges sitting *in banc*. See *Tellier* v. *Commissioner*, 342 F. 2d 690, 692 n. 3 (2 Cir. 1965), *aff'd on other grounds*, 383 U. S. 687 (1966). For all of these reasons the portion of *Baren* quoted above can only be understood as a *sui generis* exception, suggested by the peculiar facts of *Baren*, to the general rule that in prosecutions under 18 U. S. C. §1341 the Government is not required to prove that individual purchasers were actually defrauded.[12] *Baren* involved a prosecution for an allegedly

[12] The fact that other courts in other circuits have read *Baren* as meaning more than this is not determinative in this court.

fraudulent scheme to sell knitting machines to housewives: at the outset the court in that case stressed the "fundamental fact" that there was "no charge in the indictment that the machine was in any way defective or that it was incapable of performing a satisfactory knitting job." 305 F. 2d at 529. In a case like *Baren*, in which the product apparently could do what its advertising, and its other promotional matter said it could do, it may well be advisable to require that the Government produce evidence tending to prove that, despite this, purchasers were in some manner defrauded; otherwise honest merchants could, without justification, become the victims of "a few disgruntled purchasers." 305 F. 2d at 533. Cf *United States* v. *Rabinowitz*, 327 F. 2d 62 (6 Cir. 1964). But what was said in *Baren* has no application in the present case or in a case like the present case. Here the Government's claim, a claim amply supported by its trial proofs, was that the product in question was totally unable to do what its advertising and other promotional material said it could do; in such a case proof that particular purchasers were individually defauded is completely superfluous.

Appellants' second argument is that they were denied a fair trial because Martin Pollner, the Assistant United States Attorney who prosecuted the case, improperly collaborated with one Peter Wyden, author of a book "The Overweight Society," which dealt in part with the "Regimen" fraud and was published on March 22, 1965, and of a magazine article dealing exclusively with the "Regimen" fraud, which appeared in the May 1, 1965 issue of "T. V. Guide." We find this argument unconvincing. In the first place, we cannot characterize Pollner's conduct as im-

proper. Pollner, on several occasions, permitted Wyden to examine, in his (Pollner's) office, depositions which were a matter of public record that had been taken in connection with a previous civil libel proceeding against "Regimen Tablets" commenced by the Food & Drug Administration. Pollner refused to comment on the then pending criminal prosecution, he requested a pre-publication copy of the book so that he could check its contents, and he repeatedly urged Wyden to ask his publishers to delay publication until after the trial. Once Pollner learned Wyden had agreed to write an article on the "Regimen" fraud for "T. V. Guide" he asked that the article not be published until the trial was concluded. Wyden and his publishers ignored Pollner's requests and both the book and the magazine article were published before the trial's conclusion.[13] It seems clear that Pollner took no steps to ignite interest in having any material published that dealt with the "Regimen" fraud; this interest had already been kindled by the FDA's earlier civil libel proceeding against "Regimen Tablets" and the earlier New York State prosecution of these appellants and others for violating that state's false advertising statutes.[14] Thus, this is clearly not a case in which the prosecution itself initiated the intrusion of the press into the process of the trial. Compare *Sheppard* v. *Maxwell*, 86 S. Ct. 1507, 1521 (1966); *Stroble* v. *California*, 343 U. S. 181, 201 (1952) (Frankfurter, *J.*, dissenting). Secondly, the trial court on two

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[13] That Pollner could have done more than strenuously urge a delay in publication may be doubted. See *Sheppard* v. *Maxwell*, 86 S. Ct. 1507 (1966).

[14] See note 9, *supra*.

occasions asked the jury specifically whether they had read either the book or the magazine article and on both occasions each juror replied in the negative. Furthermore, the court repeatedly and emphatically admonished the jury to avoid all contact with any publicity concerning the case. Appellants point to no facts tending to establish that the jury did read this material or otherwise disobey the trial court's instructions. In view of the court's cautionary instructions, and bearing in mind that the book and the magazine article largely rehashed admissible evidence, we are satisfied that appellants were not prejudiced. See, e.g., *United States* v. *Agueci*, 310 F. 2d 817, 832 (2 Cir. 1962), *cert. denied*, 372 U. S. 959 (1963). To be sure, prejudice is inherent in certain situations, *Sheppard* v. *Maxwell, supra* at 1517, but the present set of facts can hardly be considered such a case.

We turn next to the four issues appellants raise that concern the admission at trial of allegedly inadmissible evidence.

They argue first that the court below erred in admitting in evidence testimony and documents tending to prove that several impartial observers like the National Better Business Bureau and the Kansas State Board of Health brought reports highly critical of "Regimen Tablets" to appellants' attention. As support for this position appellants note that the contents of these reports were hearsay and thus inadmissible to prove the truth of the matter asserted therein—the total ineffectiveness of "Regimen Tablets." The evidence was admitted for a limited purpose only. The trial court permitted the Government to introduce it only after carefully and repeatedly instructing

the jury that the evidence was only admissible as tending to prove that appellants knew there was a widespread belief among experts that "Regimen Tablets" were ineffective. This evidence was admissible, under these limiting instructions, on this limited issue of notice. E.g., *United States* v. *Press*, 336 F. 2d 1003, 1011-12 (2 Cir.), *cert. denied*, 379 U. S. 965 (1964); McCormick, *Evidence* §228 (1954). Appellants also seem to argue that even if this evidence was admissible on the issue of notice it should have been excluded because it was so prejudicial. We disagree. Proof that appellants knew the experts disbelieved the claims made for "Regimen Tablets"—taken together with the undisputed fact that appellants failed to qualify the claims—was the linchpin of the Government's argument that appellants intended to defraud the public. In any event, we fail to understand how this evidence could have seriously prejudiced appellants; there was much admissible evidence tending to prove "Regimen Tablets" were totally ineffective.

Appellant's second contention as to the admission of evidence is that the testimony of Drs. Mayer and Grollman should not have been admitted because it did not represent a "universality of scientific belief" that "Regimen Tablets" were ineffective—the test appellants allege was established by the Court in *Reilly* v. *Pinkus*, 338 U. S. 269, 279 (1949). This objection fails to note an important distinction between *Reilly* v. *Pinkus, supra*, and the present case. There the Government sought to use expert medical testimony not only to establish that certain product claims were false but also to establish that the claims had been advertised as part of an intentional scheme to defraud. In the present

case the Government proved that appellants intended to defraud by other evidence than that of the two doctors, such as the testimony tending to prove appellants were aware of adverse expert opinion, and chose to disregard it. The testimony of Dr. Mayer and Dr. Grollman was introduced only to establish that the advertising claims made for Regimen were scientifically false and was admissible for this purpose. McCormick, *Evidence* §§13-15 (1954).

Third, appellants allege error by the admission into evidence of their pleas of guilty interposed in the New York courts to certain counts of an information charging them with committing a misdemeanor by falsely advertising "Regimen Tablets" as a "no diet," "proven clinically effective" drug, in violation of the New York false advertising statutes.[15] Intent to defraud is not an element of false advertising under New York laws. It is difficult to state precisely appellants' objection to the admission of this evidence except to say that they consider its introduction prejudicial. To be sure, this evidence tended to prove one element of the Government's case in this federal proceeding. Under New York law the guilty pleas entered by appellants in the state proceeding were formal judicial admissions of the allegations contained in the information. *People* v. *Mason,* 307 N. Y. 570, 122 N. E. 2d 916 (1954). Thus appellants had admitted they disseminated advertisements for "Regimen Tablets" that were factually and scientifically false. The trial court instructed the jury that the guilty pleas were admissible only to prove the falsity of the claims and constituted no proof of intent to defraud. Thus limited this evidence was properly admitted. *Myers*

[15] See note 9, *supra.*

v. *United States*, 49 F. 2d 230, 231 (4 Cir. 1931); McCormick, *Evidence* §242 (1954).

The final claim that inadmissible evidence was admitted into evidence concerns the testimony of a Miss Ethel Rosenberg, employed by a Dr. Milton Plotz as a secretary-receptionist from 1942 until his death in 1962. Appellants object on imprecise grounds that this testimony should have been excluded as prejudicial. Dr. Plotz was one of several doctors hired by appellants to conduct clinical tests establishing the effectiveness of "Regimen Tablets." The Plotz clinical report was introduced below by Kastor-Hilton as tending to prove that there was clinical proof of the effectiveness of "Regimen Tablets." The Plotz report, which was favorable, purported to be based on the experience of 50 patients drawn from Dr. Plotz's practice in internal medicine. It stated that 46 of the original 50 subjects continued to participate in the test for the full test period of 10 weeks. Charts accompanying the Plotz report indicated that each of the 46 subjects was examined and weighed by Dr. Plotz each week for a period of 10 successive weeks. The testimony of Miss Rosenthal tended to disprove this for she testified she knew the patients named as participants in the clinical test survey and that during the time in question none of them came to see the doctor every week for a 10 week period or for even a two week period. The trial court carefully limited the admissibility of this evidence to the issue of the validity of the Plotz clinical survey and report. This evidence was relevant to the issue on which it was offered and we hold it was admissible for that purpose. See McCormick, *Evidence* §§151-52 (1954).

Appellants' remaining contentions are conclusory and wholly without merit. They argue, without a shred of evidentiary support, "that the conspiracy charged in this indictment was not proved, simply as a matter of the manifest deficiencies of the trial proofs." To the contrary, the Government's proofs, summarized above, amply support the proposition that Andre, Drug Research Corporation, and Kastor-Hilton conspired to perpetrate a fraud. A verdict supported by such substantial evidence cannot be disturbed. *United States* v. *Tutino*, 269 F. 2d 488, 490 (2 Cir. 1919).

Appellants readily concede that the trial judge, in his charge, faced with the heavy intellectual burden of delineating to the jury the various statutory elements of mail fraud, wire fraud, conspiracy to defraud, and misbranding as those elements related to the facts the Government adduced at trial in support of the allegations in the 58-count indictment, did a thoroughly commendable job. They argue, however, that near the conclusion of his long uninterrupted charge[18] he summarized what he had previously said and in so doing rewrote the indictment and eliminated from the jury's consideration the presumption of appellants' innocence and the requirement that guilt be proved beyond a reasonable doubt. This claim of error is entirely lacking in substance. Viewing the trial judge's charge to the jury as whole, as we should, see *United States* v. *Marchisio*, 344 F. 2d 653, 670 (2 Cir. 1965), we are convinced that he vigilantly protected all of appellants' rights.

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[18] Pp. 5621-5878 of the trial record.

Appellants argue that the jury verdict on the misbranding count must be reversed for failure of proof and because it appeared to be a compromise verdict; they further assert that the misbranding conviction is inextricably connected with the convictions on the other counts and that the arguments for reversal of these other judgments of conviction thus apply to the misbranding conviction as well. These contentions also lack merit. There was evidence sufficient to convict on the misbranding count and the evidence on this count was kept separate from the evidence on the mail and wire fraud counts in the indictment. It is true that the indictment contained 12 misbranding counts and the jury returned a guilty verdict on only one of them. This does not, however, in this case, indicate a compromise verdict: the jury had not yet reached any verdict as to the remaining 11 counts when the trial court, without objection, accepted the jury's verdict up to that point as a final verdict as to all counts. And even if this disposition indicated a compromise or inconsistent verdict, it would not necessitate reversal for prejudicial trial error because it is well settled that "consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *Dunn* v. *United States*, 284 U. S. 390, 393 (1932).

The judgments of conviction are affirmed in all respects.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of September one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge,*
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

John Andreadis, a/k/a John Andre, Saul Miklean, Arthur D. Herrick, Drug Research Corporation, a corporation, New Drug Institute, Inc., a corporation, and Kastor, Hilton, Chesley, Clifford and Atherton, Inc., a corporation,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

Statutes Involved

1. *18 U.S.C. §1341 (mail fraud—in relevant part):*

"Whoever, having devised . . . any scheme or artifice to defraud . . . by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice . . . . places in any post office . . . any matter or thing whatever to be sent or delivered by the Post Office Department . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both."

2. *18 U.S.C. §1343 (wire fraud—in relevant part):*

"Whoever, having devised . . . any scheme or artifice to defraud . . . by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice shall be fined not more than $1,000 or imprisoned not more than five years, or both."

3. *21 U.S.C. §§331(a), 331(b), 352(a), 352(f) (misbranding):*

"§331. *Prohibited acts*

The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, deviee, or cosmetic in interstate commerce."

"§352. *Misbranded drugs and devices*

A drug or device shall be deemed to be misbranded—

False or misleading label

(a) If its labeling is false or misleading in any particular.

* * * * *

Directions for use and warnings on label

(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: Provided, That where any requirement of clause (1) of this subsection, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement."

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239-609—66

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 619

JOHN ANDREADIS (OR JOHN ANDRE) AND DRUG RESEARCH CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 366 F. 2d 423.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1966. The petition for a writ of certiorari was filed on October 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for using the mails and television to defraud (18 U.S.C. 1341–1343), the jury must be instructed that it is necessary to prove

that persons intended to be defrauded were actually deceived.

2. Whether certain evidence, designed to show petitioners' knowledge that their representations concerning their product were false, was properly admitted.

3. Whether conduct of the prosecutor was improper, and if so, whether it requires reversal in the absence of a showing of prejudice.

4. Whether the verdict was supported by the evidence as to (a) fraudulent advertising claims, (b) existence of a conspiracy to defraud, and (c) misbranding.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Eastern District of New York on thirty counts of a fifty-eight count indictment charging (1) mail fraud in violation of 18 U.S.C. 1341 and 1342 (counts 1–6, 8–13, and 14–18), (2) wire fraud in violation of 18 U.S.C. 1343 and 1342 (counts 19–45), (3) conspiracy to commit the mail and wire fraud offenses in violation of 18 U.S.C. 371 (count 46) and (4) misbranding in violation of 21 U.S.C. 352(f)(1) (count 57). On June 25, 1965, petitioner Andreadis was sentenced to eighteen months in prison on each count, the sentences to run concurrently, and was fined $1,000 on each of the sixteen mail fraud and twenty-seven wire fraud counts, $3,000 on the conspiracy count, and $4,000 on the misbranding count—a total of $50,000 in fines. Petitioner Drug Research Corporation was fined $1,000 on each of the same mail and wire fraud counts, $5,000 on the conspiracy count, and $5,000 on the mis-

branding count, a total of $53,000.[1] The court of appeals affirmed.

The mail and wire fraud counts of the indictment charged that petitioners devised and participated in a scheme to defraud by means of false representations in mailed and televised advertising which held out "Regimen Tablets" as a clinically proven "No-Diet" method of weight reducing by means of drugs designed to suppress the appetite, remove excess fluid, and produce a feeling of satisfaction (Pet. 6–7). The misbranding counts accused petitioners of incorporating the same false representations on the box labels and in the circulars and displays accompanying cartons of "Regimen Tablets" (Pet. 9–10).

The evidence showed that from 1955 through 1962 "Regimen Tablets" were sold as a non-prescription "miracle" weight reducing drug (R. 658).[2] Petitioner Andreadis was the president of petitioner Drug Research Corporation and the person whose approval was needed before advertising could be run (R. 3042). Andreadis retained Kastor, Hilton, Chesley, Clifford and Atherton, Inc. (hereafter Kastor-Hilton), as his advertising agency from 1957 through 1961 (R. 658). At his direction, Kastor-Hilton undertook a nation-

[1] Co-defendant Kastor, Hilton, Chesley, Clifford and Atherton, Inc., was also convicted on substantive counts 1–6, 8–11, 15–17, 19–45, and on the conspiracy count it paid a $50,000 fine. Co-defendant New Drug Institute, Inc., pleaded guilty to counts 1, 19, 47, and 49. The cases against co-defendants Herrick and Miklean were dismissed. The trial court granted a motion of acquittal as to all defendants on counts 7 and 14, and no verdict was rendered on counts 47–56 and count 58.

[2] The record on file with the Clerk of this Court is in 12 volumes, consecutively paginated. Pages 4760–5283 are missing.

wide advertising campaign that cost Drug Research between 7 and 10 million dollars and resulted in gross sales of 12 to 15 million dollars through 1961 (R. 657, 2810, 3181).

The basic theme of all "Regimen Tablet" advertisements from 1957 through 1962 consisted of two ideas: that Regimen was a new wonder drug which would enable the user to lose weight without dieting; and that it had been medically tested and clinically proved (R. 3041).

The advertising campaign included the hiring of "endorsers," persons who appeared periodically on television programs and stated that, while taking "Regimen Tablets," they were losing weight without dieting. Dorothy Bryce testified of being hired as an endorser by Andreadis who asked her, "If I hire you how do I know you will lose weight?" He told her that "no drug was a miracle" and that she would have to diet (R. 710, 930). Her contract provided inducements for her to lose weight, and, by a side agreement, she received a $50 bonus for every pound over fifteen that she lost (R. 930–932, 2362, 1396–1397, 3129–3130, 2716). Under the supervision of Kastor-Hilton (R. 2266–2269, Exh. 90), in six weeks she lost twenty-five pounds on a starvation diet (R. 803–804, 936, 950). She also used a drug called Diruil, suggested by petitioners' physician, to lose body fluids (R. 792–793). While on the diet she made regular television appearances during which she stated she was losing weight without dieting (R. 774, 952–959). Similar testimony was elicited from other hired endorsers.

Petitioners' advertising copy regularly included assertions that the "new wonder drug" had been subjected to clinical tests (referred to as "clinicals"). Petitioners purported to engage physicians to test the drug's efficacy and to substantiate their advertising claims (R. 3341, 3342, 3373), in order to obtain acceptance of the claims by advertising media (R. 3341–3344). However, Dr. Grollman, appearing as an expert for the government, testified that he had reviewed the alleged clinical tests and concluded that they were meaningless and did not establish the efficacy of "Regimen Tablets" (R. 4464–4478). He and Dr. Mayer, another expert, were in complete agreement that "Regimen Tablets" were totally ineffective as an aid in losing weight (R. 350, 4441-4443) and that their opinions reflected the views of the scientific literature and community (R. 4460, 355–357, 406). Both testified that the Fazekes test, a well-controlled scientific experiment which had been performed on "PPA," the primary ingredient in "Regimen," had established that, even at double the dosage level in "Regimen," the drug was ineffective in curbing appetite, and that its effect was essentially identical to that of a placebo used in the test (R. 584–601, 4478–4480).

Complaints and criticisms about petitioners' advertising claims for "Regimen Tablets" (including the so-called "clinicals") were expressed, beginning around 1957, by the Food and Drug Administration, the Kansas State Board of Health (R. 4650), the National Better Business Bureau, the American Medical Association, and the New York Academy of

Medicine (R. 4659 *et seq.*). The agency and these organizations asserted that the claims regarding loss of weight without dieting were unsubstantiated and that the clinical tests were worthless. These views were communicated to petitioners by Kenneth Wilson, President of the National Better Business Bureau (R. 4675 *et seq.*),[3] by the Kansas State Board of Health (R. 4655), by officials of "Life" magazine (R. 3820), the National Broadcasting Company (R. 3332), and other publishers and broadcasters (R. 3195, 3198). Executives of Kastor-Hilton discussed news of the Fazekes test and the numerous criticisms with petitioner Andreadis (*e.g.*, R. 3195, 3202, 3272–3283); believing the product could not be sold without the representations (R. 3051, 3195), Andreadis rejected the complaints and ordered Kastor-Hilton to continue the campaign unchanged (*e.g.*, R. 3284–3285a).

In 1964, petitioners pleaded guilty to a State charge of falsely advertising "Regimen Tablets" as a no-diet clinically-proven reducing drug (R. 4840–4842). In admitting evidence of these pleas, the court instructed the jury that the State statute required no proof of intent to falsify or defraud (R. 4845).

After trial, the court heard evidence (R. 5492 *et seq.*) on petitioners' complaint that the prosecutor, Martin Pollner, had improperly collaborated with

[3] Mr. Wilson showed petitioner Andreadis a letter from Dr. Brown, one of the physicians hired by petitioners to perform clinical evaluations of "Regimen," in which Brown stated that no scientific conclusions could be drawn from his clinicals and that he did not believe they established that "Regimen" was a "no-diet" reducing drug (R. 4706–4709, Exh. 172). Petitioners continued to use the clinicals (R. 3341–3363).

writer Peter Wyden in the latter's researching of a highly derogatory chapter on "Regimen" for his book "Overweight Society" published on March 22, 1965, during the trial (R. 5529). The chapter was later condensed and published on May 1, 1965, in "T.V. Guide" magazine (R. 5606). During the trial the court twice asked the jurors if they had read either publication and received negative responses (R. 5308, 5495–5497). And throughout the trial, the court repeatedly admonished the jurors that they must not read any publicity about the case (R. 6–7, 642, 815, 2721, 3109, 3290, 3442).

The evidence at the hearing showed that Peter Wyden approached Mr. Pollner after having read the extensive National Better Business Bureau file and the transcript of a Congressional hearing, both regarding "Regimen," and after having conferred with Food and Drug Administration officials and with the prosecutor in the prior State case (R. 5559, 5560, 5584, 5592). He had learned that Mr. Pollner had in his office a set of the depositions given in 1964 in a civil case brought against "Regimen" by the Food and Drug Administration. These depositions were part of the public record on file in the United States District Court (R. 5548–5550). Although Mr. Pollner allowed Wyden to read the depositions in his office on several occasions, he volunteered no information (R. 5561–5562, 5540, 5548). Wyden characterized Pollner's attitude as one of apprehension, saying "* * * [H]e did everything but throw me out of the office" (R. 5578–5579). Pollner expressed concern that the book (and later the article) would be pub-

lished before the trial ended (R. 5514), and sought to delay both so that neither would interfere with the trial (R. 5579, 5588). The court found that nothing in the conduct of Mr. Pollner had affected the trial, and that the jurors had read neither the book nor the article (R. 5639).

ARGUMENT

1. The evidence was clear and uncontradicted that petitioners' advertised product was incapable of doing what petitioners said it could do: cause loss of weight without dieting. Nevertheless, petitioners contend (Pet. 22–32) that the mail and wire fraud convictions should have been reversed because the indictment did not allege, and the judge did not instruct the jury that it must find, that someone was in fact defrauded.[4] Petitioners recognize that it has long been the established rule in mail and wire fraud cases that the government need not prove that the fraudulent scheme was actually successful in defrauding anyone. *Pereira* v. *United States*, 347 U.S. 1; *Adjmi* v. *United States*, 346 F. 2d 654 (C.A. 5), certiorari denied, 382 U.S. 823; *United States* v. *Rowe*, 56 F. 2d 747 (C.A. 2), certiorari denied, 286 U.S. 554. Petitioners read *United States* v. *Baren*, 305 F. 2d 527 (C.A. 2) and *United States* v. *Rabinowitz*, 327 F. 2d 62 (C.A. 6), as changing this settled principle. The court below, which decided the *Baren* case, viewed it as confined to

[4] There was in fact evidence that persons were defrauded. At trial the government produced purchasers who testified that "Regimen" failed to help them lose weight, that some had actually gained weight, that when a refund was made it was less than the amount due, and that some got no money back (R. 4875–4922).

the situation where the product was in fact capable of doing what its promoters said it could do, the fraud arising out of sales misrepresentations unrelated to the quality of the product itself. See 366 F. 2d at 431. For the same reason, the *Rabinowitz* case is also inapposite. The court stated in *Rabinowitz* that "the 'inherent utility' of the [product] * * * removes this case from the ordinary run of mail fraud prosecutions." 327 F. 2d at 66. Thus, neither case supports petitioners, whose product was a fake,[5] and neither purports to change the established rule that the government need not offer proof that persons whom a defendant intended to defraud were actually deceived.

2. Petitioners decry the admission of evidence regarding complaints made by the National Better Business Bureau and others to petitioners about the falsity of their advertising claims of no-diet reducing and clinical tests (Pet. 36–39). The court admitted the evidence with repeated instructions (*e.g.* R. 4669–4670 and 3279) that it was received only upon the issue of whether the defendants had knowledge that their claims as to the efficacy of "Regimen Tablets" were false—essential to the issue of intent to defraud—and not for the truth of the matter asserted in

[5] The court below pointed out, 366 F. 2d at 431, that when the product was capable of performing as advertised, it may be advisable—in order to protect innocent sellers—to require proof that purchasers were in some way deceived. We think such protection is adequately afforded by the requirement of proof of intent to defraud—precisely the element on which the *Rabinowitz* case was decided, petitioners' assertions to the contrary notwithstanding. See 327 F. 2d at 80–81. The *Baren* and *Rabinowitz* cases involved, incidentally, the sale of similar products, namely knitting machines.

the complaints. The court further instructed the jury that the truth or falsity of petitioners' promotional claims for "Regimen Tablets" would have to be established by independent evidence and not by the complaints. The admission of such evidence with the limiting instructions was proper. *United States* v. *Press*, 336 F. 2d 1003 (C.A. 2), certiorari denied, 379 U.S. 965.

3. The inquiry into the conduct of the prosecutor in relation to the publication of Peter Wyden's book and magazine article demonstrated that petitioners' complaint was baseless (see Pet. 40–44). The prosecutor did not engage in "collaboration with the author" (Pet. 40) nor participate "in a sensationalized attack on Regimen tablets" (Pet. 3); indeed, he attempted to discourage and delay publication until after the trial. The court of appeals found nothing improper in his conduct (366 F. 2d at 432).

Moreover, the court throughout the trial repeatedly admonished the jurors not to read any publicity about the case, and on two separate occasions each juror denied that he had read the publications. Petitioners do not claim that the jurors were untruthful.

4. Petitioners' complaints as to the sufficiency of the evidence are also without merit.

a. Petitioners' reliance (Pet. 32–36) upon *Reilly* v. *Pinkus*, 338 U.S. 269, is misplaced, because the evidence of Doctors Grollman and Mayer, which petitioners say was insufficient on the issue of intent to defraud, was in fact admitted to show that petitioners' representations about their product were scien-

tifically false. *Reilly* merely implies that, if something less than universality of scientific belief is shown, an intent to deceive might not be inferrable. Here, however, there was ample additional and independent evidence of petitioners' intent. In addition, the court's instructions regarding these expert witnesses, to which petitioners raised no objection, were proper.

b. There was ample evidence to support the conspiracy charge (compare Pet. 45–46). The evidence showed agreements between petitioners and their advertising agency, among other things, to submit advertising to media knowing the copy to be false, to submit false clinical test reports to media, to put endorsers on television knowing they were not telling the truth, to falsify the entire endorser program, and to ignore the criticism and objections leveled at their advertisements. The court of appeals properly characterized petitioners' bald claim of the "manifest deficiencies of the trial proofs" (Pet. 46) on the conspiracy charge as "without a shred of evidentiary support," "conclusory," and "wholly without merit" (366 F. 2d at 434).

c. Petitioners conclude from the fact that the jury rendered a verdict on only one of the twelve misbranding counts that the jury was confused, that the verdict was a compromise, and that the evidence was insufficient to support the charge. (Pet. 47–50). Even assuming the verdict was logically inconsistent, that is not a ground for reversal. *Dunn* v. *United States*, 284 U.S. 390.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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